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**LABOR DISPUTES AND
COLLECTIVE BARGAINING**

The Law Governing
LABOR DISPUTES
AND
COLLECTIVE BARGAINING

BY
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OF THE NEW YORK BAR



IN THREE VOLUMES
VOLUME ONE

NEW YORK
BAKER, VOORHIS & CO., INC.
1940

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TO MY WIFE
CLARICE S. TELLER

PREFACE

Statutory development and the accumulation of a host of judicial precedents have made of labor relations law a subject of wide comprehension. It is the purpose of this work to state the scope of that comprehension and to examine its implications. There is little need, if any, to offer apology for having included, in addition to a statement of the law as actually worked out in legislation and judicial decision, points of underlying analysis and criticism. Much has been shaped and clarified by the decided cases, but there is also a good deal of uncertainty, more perhaps than in any other law subject, which discussion will do little to enhance and may do much to resolve. I have cast my lot with no faction. Neither dogmatism nor partiality has been the source of such discussion.

Acknowledgment is made of the assistance of Professor Frederick J. DeSloovere and Dr. Walter Derenberg of the New York University Law School. For uncounted hours of valuable advice, I owe a debt of gratitude to Isidor E. Schlesinger, Esq., of the New York Bar. Space does not permit of individual acknowledgment to many others who assisted in one way or another in the preparation of this work.

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THE LAW GOVERNING LABOR DISPUTES AND COLLECTIVE BARGAINING

PART I

HISTORICAL BACKGROUND AND BASIC CONCEPTIONS

CHAPTER ONE

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Section 1. Instances of Labor Activity Prior to the Industrial Revolution.

The modern labor movement, whose blue prints are sketched in terms of trade and industrial unions, strikes, pickets, boycotts, the notion of collective bargaining and the collective bargaining agreement, is a phenomenon without historical counterpart. An historical sketch of the industrial world from early to modern times should therefore be prefaced with the statement that things have never quite been before, what they are today. There is no doubt, upon the other hand, that many of the forces which have coalesced to constitute what we call labor relations today have evolved from the contentions of yesterday. Indeed, disparagement of historical background would disregard the

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circumstance that the institution of private property, though subjected to varying modifications of time and place, has guided men's livelihood efforts since the earliest days of recorded history. This work is consequently prefaced with a short analysis of the social and economic background of the labor movement as we know it today.

Early history at the hands of the general historian is usually represented as a succession of bizarre events whose heroes monopolize the attention. Though we are told, to be sure, that the common man lived, his daily doings do not seem to reflect any awareness with respect to his lot and social position. An outstanding exception is the historian C. Osborne Ward, whose treatise "The Ancient Lowly" purports to be "A History of the Ancient Working People from the Earliest Known Period to the Adoption of Christianity by Constantine"¹ To Ward, the ancient world is an active workers' world. We are told that "the introduction of Christianity was fought, and for a long time resisted, by the laboring element itself, solely on the ground that it seriously interfered with idol, amulet, palladium and temple drapery manufacture."² Complaining that the great strikes and uprisings of the working people of the ancient world are almost unknown to the living age,³ Ward sings the praises of Spartacus the labor leader who, though almost ignored by standard encyclopedias, was "one of the great generals of history, fully equal to Hannibal and Napoleon, while his cause was much more just and infinitely nobler, his life a model of the beautiful and virtuous, his death an episode of surpassing grandeur."⁴ A general labor movement, however, concededly there was none. Temporary maladjustments resulting from particular situations called forth sporadic efforts more or less organized, designed to remedy the evils of particular situations.

Search is equally vain for the emergence of a general labor movement in the middle ages. In the main, the middle ages are identified with the institution of Feudalism,

1. 1888.

2 Ibid, p. v.

3 Ibid, p. vi.

4. Ibid, p. vi.

whose civilization must be compared with capitalism by contrast. Land, not industry, was the main basis of wealth. Exchange was the exception. But while the relationship of lord and man stifled free movement in the country, the towns in England were developing a trading life whose postulates of personal initiative were the forerunners of capitalist ideology. Indeed, craft guilds were already so jealous of incursions upon free enterprise that we find rules enacted against the more unscrupulous and less ethical: "In those occupations that involved buying and selling the necessities of life, such as those of fishmongers and the bakers, the officers of the fraternity, like the authorities of the town, were engaged in a continual struggle with 'regrators,' 'forestallers' and 'engrossers' which were appellations as odious as they were common in the medieval town. Regrating meant buying to sell again at a higher price, without having made any addition to the value of the goods; forestalling was going to the place of production to buy, or in any way trying to outwit fellow dealers by purchasing things before they come into the open market where all had the same opportunity; engrossing was buying up the whole supply, or so much of it as not to allow other dealers to get what they needed, the modern 'cornering the market'."⁵

Moreover, England gave no indication during the middle ages of her great industrial destiny so much as did Italy and Germany and the towns of Central France and Netherlands, which carried on a rich trade and commerce, and whose state of industrial development was reflected in the advanced propositions of their law merchant. A prudent evaluation of industrial development in the middle ages would go no further than to conclude that the individual was awakening, not so much in England as on the Continent, to his own potentialities. The scope of commerce and enterprise was generally non-productive, however, of mass employment or class theories.

It is common to conceive modern trade-unionism as an

5. Chevney, *Industrial and Social History of England* (1927), p. 57.

evolution from the English and American guilds. While it is true that in the fifteenth and sixteenth centuries, journeymen (employees) guilds had become prevalent institutions, and while it is likewise true that these guilds had a certain modicum of group consciousness (as is evidenced by the fact that they entered into written agreements with master guilds), there is nevertheless no probative evidence that their organizational conceptions projected themselves into the trade union movement. Whatever evidence is available would seem to point to the fact that guilds vanished for one reason before trade-unionism appeared for another.⁶

This is not to say that the middle ages were happy times. The widespread existence of pauperism is too well attested by the existence of beggars in such quantities as to have called forth a treatise descriptive of their activities.⁷ German miners combined in a manner strikingly similar to modern times, and struck for higher wages. Of the several strikes in France, the great strike of the miners in Lyons is generally considered to be most outstanding. Indeed the 16th century has been likened unto our modern times in many respects. Blacklisting of labor agitators was resorted to. "Typical of these was the agreement made by Duke George of Saxony and other large mine owners not to raise wages, not to allow miners to go from place to place seeking work, and not to hire any troublesome agitator once dismissed by any operator,"⁸ and again, "The aggregate of capital, if we may judge from many other indications, notably increased throughout the century. But it became more and more concentrated in a few hands."⁹

Section 2. Development of Enterprise and Mercantilism.

The seventeenth and early eighteenth centuries saw, especially in England, both an extension of enterprise and the development of mercantilism. Feudalism breathed its last,

6. See Unwin, *The Guilds and Companies of London and Industrial Organization in the 16th and 17th centuries* (London, 1925).

7. Matthew Hutton, *The Book of Vagabonds* (1550).

8. Preserved Smith, *The Age of the Reformation*, p. 555.

9. *Ibid.*, p. 556.

while ecclesiastical principles, though lingering somewhat longer, waned as guiding precepts in the nation's life. The disestablishment of the conceptions of status created a host of landless workers who only yesterday had been resisting the duty to work under the various Statutes of Laborers, and relegated them to such means as they might find to support themselves in a country whose enclosures narrowed the allowable area of free endeavor. To the untitled, the decline of status meant merely the substitution of one degradation for another. The vivacious Gerard Winstanley set the pace of discontent. In the middle of the seventeenth century, he advocated in his "Watchword to the City of London" and more elaborately (and with greater invective) in his "Law of Freedom," the abolition of tithes and lawyers, the former because they were an abominable and baseless monopoly, and the latter because, like jailers, they preserved with apparent relish the subtleties of the land laws which were the bars of a prison whose many inmates were the miserably poor. The poor must inherit the earth, he maintained, pointing to Jesus Christ as precedent for his arguments. England was in the midway. The landed aristocracy was instrumental in securing the enactment into law of a host of arbitrary restrictions upon business. And to these restrictions were added the governmental intrusion into free business dealings which resulted from dominance of the mercantile system. At the close of the middle ages, this system of thought emerged as the leading policy in England. Under it the new money economy and the notion of a "balance of trade" were reflected in trade barriers and government regulations of business aimed at keeping at home the precious metals. Forecast of a later era, however, is found in governmental protection and encouragement to urban centers because, unlike agricultural regions, they made possible a more intense manufacture of goods for export.

Surrounding these externals were the forebodings of larger cultural movements. The Reformation in the sixteenth century had planted the seeds of the Enlightenment. The Renaissance held the stage of humanity in the transi-

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tion from the middle ages to modern times. The one movement emancipated the conscience of man while the other awakened his intellect. Breakdown of the medieval attitude of disrespect for the rights of the individual and the possibilities for his development was their common contribution to the destiny of the modern human being.

Section 3. Consequences of the Industrial Revolution.

It was the impersonalization of industrial activity generally known as the factory system which first crystallized the modern philosophy of individualism on the one hand, and of government upon the other. The industrial revolution, whose beginnings in England date from the years 1760 to 1820 and in America perhaps from the middle of the 19th century,¹⁰ has been the subject of treatise and weighty tracts. Attempts to explain the advent of the industrial revolution have been both numerous and inconclusive. Like the fall of Rome, the cradles of the industrial revolution have baffled historians and philosophers alike. Of the former event, Professor Stephenson prefaced his "Medieval History"¹¹ as follows: "At the very outset of our study—and this is characteristic of historical investigation in general—we encounter an unsolved problem. We are confronted by the fact that the Roman Empire, after being synonymous of grandeur and stability for hundreds of years, disintegrated in the fifth century and we cannot say with assurance just how it came about." Theories of history called Geographical, Theological, Economic, Racial, Philosophical and Psychological have been advanced. Vico contended for three historical stages of savagery, barbarism and civilization, and concluded that barbarians overthrew Rome by pitting brute force against the lofty refinements of the Roman civiliza-

10. Landed aristocracy was mainly limited to Southern United States: America never went through a period of feudalism, its earliest form of economic activity relating to trade and small scale manufacture and commerce. The industrial revolu-

tion in the modern sense of large scale enterprise, production and distribution did not take effect in the United States until well after the middle of the 19th century.

11. New York, 1935

tion. Marx, on the other hand, divided history into the pastoral, handicraft and industrial—or machine stages, and contended that the fall of Rome was to be found in the economic circumstance of the poverty of her soil. When the turmoil of contending dogmas is concluded, the single indisputable fact remaining is simply that Rome fell.

The causes of the industrial revolution have met with general agreement equally scant. The fortuity of concomitant mechanical inventions is considered by some to be the proper background. Marx, concentrating again on the economic factor, insisted that the economic situation of the times called forth and was responsible for these mechanical inventions. But he never adequately explained what economic situation it was which impelled the making of inventions, and why the eighteenth and nineteenth centuries, and not some other centuries, were the time of revolution. Bertrand Russel has advanced the theory that "it was the growth of science after the Renaissance that led to modern industry"¹² The rise of the industrial revolution may most probably be understood with greatest profit in terms of the unfolding of institutions—an unfolding the main-spring of which no philosophy of history has as yet basically revealed.

We do know, however, that when the series of events which we call the industrial revolution had completed the broad outlines of its underlying theory, the social framework which it created saw the decline of home handicraft, the growth of urbanization, the expropriation of many farmers, the rise of factory towns in new industrial centers and a phenomenal increase in the production of commodities. It also impressed upon the new society which we identify with capitalism three outstanding concepts which, though generally obscured by the language of the law, are the touchstones of American judicial labor decisions. "Technical legal doctrines and theories gain meaning only

12. Russel, *Freedom Versus Organization* (1934), p. 199f.

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when placed in the perspective of the larger movements of thought which gave them nurture." ¹³

The first related to the individual, ennobled as a mine of energy, whose untrammelled activity would redound to the public weal. Here is the pivotal notion of the deity individualism. "Private interest," said the political writer James Anderson in 1860, "is the greatest source of public good which, though operating unseen, never ceases one moment to act with unabating power, if it be not perverted by the futile regulations of some shortsighted politicians." ¹⁴ A little earlier, Malthus, whose "Essays on Population" has become a stock work for critical observance, remarked in 1817 that "by making the passion of self-love beyond comparison stronger than the passion of benevolence, the more ignorant are led to pursue the general happiness, an end which they would have totally failed to attain if the moving principle of their conduct had been benevolence." The contentions of Darwin with respect to the struggle for life and the survival of the fittest were eagerly quoted by those who saw in free enterprise and laissez-faire the embodiment of an indisputable biological principle. Ethics, too, was fascinated with the new conception—the extension of the individual personality into the field of industrial activity, it was argued, would conduce to the realization of the good life. And psychologists were able to identify selfishness with the social good.

The second related to the state, which was submerged under a theory of universal freedom of private competitive effort. There was no state under feudalism. The central government was bankrupt for lack of revenue, and impotent for inability to control contending groups. Let there be a minimum of statehood under capitalism too, said Adam Smith, for the different reason that it interferes with the natural course of things. "The patrimony of a poor man," he argued, "lies in the strength and dexterity of his hands; and to hinder him from employing this strength

13. Felix Frankfurter, Book Review (1930), 43 Harv L Rev 1168, 1171. 14. In his "Political Economy."

and dexterity in what manner he thinks proper without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the other from employing whom they think proper.”¹⁵ Statelessness was thus a theory of capitalism which reflected a spirit of laissez-faire, a faith in the free daily doings of everyday man. Carlyle’s remarkable phrase defined the society as “anarchy plus a constable.”

The third related to the basis of wealth. The thinkers of the new era had before them the task of justifying an attack upon the landed interests. Industry, not land, was the true basis of personal wealth, they said, and their reasoning was as admirable as it was simple. The free contract in the perfect market by the free man was the achievement of an individualist society, a contract which, from its very nature, would redound to the benefit of each of the contracting parties, and thereby to the benefit of society. It results that the basis of wealth (industry) is the reflection of a benefit to society (a mutually beneficial contract). A pompous aristocracy looked on with psychological haughtiness while the “vulgar tradesman” wrung privilege upon privilege from accustomed sovereignties in need of money. The industrial revolution was a relatively bloodless revolution because the revolutionaries possessed the money to buy off the vengeance of the dominant classes of a former day. Indeed, the rising industrialists experienced no substantial difficulty in achieving economic dominance and consequent rulership in Great Britain. Here in America their dominance was never questioned, and we have the high authority of a painstaking historian,¹⁶ that they wrote a national constitution to fit their needs. “Working and owning classes are close allies and not opponents,” said Thomas

15. *Wealth of Nations* (1776), Bk iv, c. 2. See also *ibid.*, Bk i, c. 2, Bk ii, c. 2, Bk iii, c. 1.

16. Charles A. Beard, *Economic Interpretation of the Constitution* (1935).

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Henry Huxley. "The qualities that insure success," he insisted, "are energy, industry, intellectual capacity, tenacity of purpose . . . while fools and knaves sink to their natural place at the bottom." Feudalism looked upon the world from the cross-roads of the landed aristocracy, while the capitalist society preferred to find human excellence in the activities of the market place. Two subtleties consequently developed in the judicial labor decision. The first viewed the worker as the beneficiary of the employer's enterprise, and the worker's efforts at unionization as the activities of an ingrate. The second considered the employer's right to a free market as a social good so intimately bound up with the destiny of the new economic life as to require the placing of the stamp of illegality or unconstitutionality upon any interferences with that freedom, and included in such asserted interferences were the activities of labor organizations.

Section 4. Foundations of the Sanctions Applied by Law to Labor Combinations and Labor Activities.

The ways of thinking generated by the industrial revolution and especially the three main conceptions heretofore considered, of the individual, the state and the basis of wealth, were rapidly infused into the common law and more particularly into the life of the judicial labor decision. The story of that infusion can best be understood as the record of two impulses: the theory of natural rights, and the notion of the right to a free and open market. These, it is submitted, are the groundworks of the American judicial labor decision. It is commonplace today that the common law is property law whose method, steeped in *stare decises*, has been mainly that of tradition. "What is peculiar to Anglo-American legal thinking," observes Dean Pound, "And above all to American legal thinking, is an ultra-individualism; an uncompromising insistence upon individual interests and individual property as the focal point of our jurisprudence."¹⁷ Natural rights theorizing and the notion of the entrepreneur's right to a free

¹⁷ Pound, *The Spirit of the Common Law* (1921), p. 37.

and open market added to the content of the common law a conception of individualism whose doctrinaire assertion of laissez-faire included intuitive thinking about the rôle of the individual, the psychological component of which was an ideal of privacy of personal destiny, and whose underlying belief put faith in personal initiative and individual effort as the best means of achieving a social order. Such, then, is the background of American law. To observe that legal doctrine has not been kindly disposed to the aims of labor organizations is to say merely that American law has been faithful to its mainsprings. The groundworks of the American judicial labor decision referred to have laid the foundations of judicial disfavor toward workingmen in combination. Such disfavor has taken two forms. The first has been judicial hostility, in connection with the tools of positive legal doctrines, to the activities of labor combinations. The second has been judicially evolved constitutional obstructions to such activities and to the purposes which labor activities seek to achieve. Consideration of the two groundworks of the American judicial labor decision, and of the two consequences thereof, will be the subject matter of following chapters (chapters two, three and four). Analysis of the positive legal doctrines which reflect these foundations—the doctrine of criminal and civil conspiracy, the remedy of injunction and the numerous other civil and criminal sanctions—will be the task of the subsequent chapter (chapter five).

CHAPTER TWO

GROUNDWORKS OF THE AMERICAN JUDICIAL LABOR DECISION—THE THEORY OF NATURAL RIGHTS

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Section 5. Statement of the Theory of Natural Rights.

"It is the undoubted and unabridged natural right of every individual *not to employ, or to refuse to employ, whomsoever he may wish, and he cannot be called upon to answer to the public or to individuals for his judgment.*" With these words, an Ohio Court¹ prefaced a holding that a combination to blacklist was legally unassailable because each of the employers who were parties to the combination had a "right" singly to do that which the combined employers were accused of having done. The right of an employer to exact a yellow-dog contract from his employee as a condition of employment was an incident of the employer's "natural rights."² In the field of labor law perhaps more than in any other, the theory of natural rights has been an important basis, even if often a concealed basis, of judicial decision.

The theory of natural rights, though prevalent in a sporadic but not insignificant way during Greek, Roman and Medieval European Civilization,³ assumed for the first

1. New York, Chicago & St. Louis R. R. Co v Scheffer, 65 Ohio St 414, 62 NE 1036 (1902). For other cases holding to like effect see section 472, *infra*. The subject of blacklisting is discussed at chapter twenty-seven, *infra*.

2. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 US 229, 38 S Ct 65, 62 L Ed 260, LRA1918C, 497, Ann Cas 1918B, 461 (1917). See further, in connection with yellow-dog contracts, *infra*, sections 48, 459-461.

3. John L. Myres, *The Political*

time a dominantly vital aspect of men's strivings and philosopher's thoughts during the seventeenth, eighteenth and, especially in America, the nineteenth centuries, when the rising industrial middle class wove a web of rectitude to justify a death blow to the customs of a decadent feudal society. Man in a state of nature, said the natural rights thinker, was free. His freedom was anterior to society. The social structure as personified by the state was a tool devised by free man for the purpose of enabling him to carry out those tasks which, from their social nature, could best be performed by the group. Should the state go further, however, and codify laws destructive of men's rights in a state of nature, those laws would be void for the reason that they are ultra vires the state's authority. Natural rights thinkers alleged that they had "discovered the lost title-deeds of the human race"⁴ Outstanding codifications which reflect the natural rights theory are the Virginia Declaration of Rights, the Declaration of Independence, the French Declaration of Rights and the first eight amendments to the federal constitution.

Section 6. Conflict over Which Rights Are Natural Rights.

While philosophers attained unusual unanimity of opinion with respect to the superior quality of natural rights in relation to state law, whether as a guide to its wisdom,⁵

Ideas of the Greeks (1927), p. 270. W. W. Buckland. *A Manual of Roman Private Law* (1925), p. 38ff. Gierke, *Political Theories in the Middle Ages*, pp. 173, 174. Haines, in his book, *The Revival of Natural Law Concepts* (1930), at p. 20, observes the following. "Medievalists agreed on the existence of natural law; they differed merely as to its force and effectiveness. To some, a statute or an executive act which violated natural law was void; to others, interested either in the claims of kings and princes to be sovereign in the civil domain, or in the idea

of popular sovereignty, natural law comprised guiding principles directive only in the process of law making."

The term 'Natural Rights' is here used synonymously with "Natural Law," although the latter is sometimes more carefully defined as the source of the former.

4. Riche, *Natural Rights* (1903), pp. 287-301

5. Bodin, Spinoza and especially Austin inclined to the view that the state was omnipotent; natural law theories were no more than philosopher's strivings from prevailing morals toward a higher ethics.

or as a test of its validity,⁶ differing theories resulted with respect to the precise rights which could aspire to the eternal characteristics of naturalness. In part this resulted from the fact that philosophers who, "with a very natural impulse to magnify their own cult have tended to claim for it a divine or at least a heroic ancestry,"⁷ found it difficult to reconcile divinity with affairs of men. In greater part, however, and more realistically, the cause was precisely the inverse: bitter social conflict gave rise to ethical speculations designed to give direction to the rumblings of the disgruntled. Although the ideal was the achievement of immutable principles universally applicable, differently constituted minds and various circumstances occasioned a variably emphasized galaxy of absolute rights: the rights of life, of liberty, toleration, public meeting, contract, resistance to oppression, equality, property, happiness. To Rousseau the cry "Back to nature!" reflected a notion that feudal fetters were destructive of man's essentially simple and equalitarian nature. Locke's natural law thought, on the other hand, represented a group of polished and highly advanced property postulates, whose dominant absolutes were equality before the law and inviolability of individual ownership in property. The urgency of immediates and the circumstances of time and place colored the precise rights alleged: French physiocrats, in reaction to governmental measures which impoverished agriculture, conceived of land as the ethical basis of wealth; industry was the mere shaping of land. Locke, in England on the other hand, held labor and not land as the vital quality of extension which gave rise to the natural right.

Section. 7. Theory of Natural Rights in England.

The history of the natural rights theory is not a consistent one. Its propagandists have met with varied mis-

6. Outstandingly, John Locke (Second Treatise of Civil Government, Book II, Section 6). J. McLean: "Statutes of law enacted against fundamental morality are void," H. W. Beecher: "When laws cease to be

beneficial to men they cease to be obligatory."

7. Winspear, *The Birth of Western Philosophy*, 3 *Science & Society*, 433, 434.

carriage or success throughout the world. Restricting our study to America and its common law parent England, it may be said that the design of natural right politicians met with success in America to the extent that it encountered failure in Great Britain. Progressive England found in Parliament a body whose achievements were calculated by the measure of limitations imposed upon the king's alleged prerogatives. It was Lord Coke's failure to distinguish between the backwardness of the Stuart Kings and the progressiveness of Parliament which probably occasioned his dictum in the famous *Dr. Bonham's case*:⁸ "It appears in our books that in many cases, the common law will control acts of Parliament and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right or reason, or repugnant or impossible to be performed, the common law will control it and adjudge such act to be void." Much controversy has been occasioned by *Bonham's case*,⁹ but it is uniformly admitted that the doctrine there expressed found no seed for future growth in England.¹⁰ The conception of Parliamentary Supremacy found new support in England by way of horror over the excesses of the French Revolution, for the adopted child of the revolutionists in France was none other than the theory of natural rights. Edmund Burke's famous book, "*Reflections on the Revolution in France, and on the Proceedings in Certain Societies in London Relative to that Event*" expressed his hatred for violence, and his suspicion of natural rights

8 8 Co 118a

9. Plucknett, *Bonham's Case and Judicial Review* (1927), 40 *Harv L Rev* 30; C. G. Haines, *The American Doctrine of Judicial Supremacy* (1914), pp 25ff. Holdsworth, in his treatise, *History of English Law* II, 131, 195, 196, 441-443, 602, explains the evolution of the notion that supremacy of law in England was the supremacy of Parliament, a view which is supported by Maitland in his work, *The Constitutional History of England* (1909), p. 301.

10. "We find a series of dicta, ex-

tending to the early part of the 18th century, to the effect that statutes contrary to natural justice or common right may be treated as void. This opinion is most strongly expressed by Coke but like many of his confident opinions, are extra-judicial. Although Coke was no canonist we may be pretty sure that it was ultimately derived from the canonist doctrine prevailing on the Continent in Europe." Pollack, *The Expansion of the Common Law*, pp. 121, 122.

as a theory devoid of essential meaning, which acted as a means of incitement only. Burke's book made him popular even in circles where his merit had theretofore been decried. Englishmen of all classes and creeds combined in thanks to England's sanity of political doctrine as one of supremacy of law and order. Parliamentary government was everywhere the subject of eulogy. Pioneers of the industrial revolution too found in Parliament an effective instrument for curbing the king's alleged prerogative. In England, therefore, since the time of the French Revolution, the industrial, social and cultural life have undergone profound evolution, but the supremacy of Parliament and the disdain for abstract theory of right have continued to be cornerstones of its sociology. We are able to point to a progressive English labor law whose basic conceptions are still far ahead of American development partly because English battles of policy were fought in legislative halls whose noises reverberated with the actualities of social conditions.

Section 8. Theory of Natural Rights in America.

Natural law theory has received quite a different reception in the United States. The accidents of history, which obstructed recourse to it in England, have, on the contrary, favored its reception here. The Declaration of Independence, one of history's greatest natural rights documents, found its necessity in the desire of Britain's overseas colonies to justify a breach with the mother country.¹¹ Jefferson is said to have utilized John Locke's natural right terminology to work out a Rousseauist natural right theory all his own, by virtue of which "self-evident truths" were conceived, among which was the right in the people (in what proportion was not made clear) to abolish a tyrannical government, and institute a new one. Other inalienable rights were life, liberty and the pursuit of happiness. Included also was the statement that government was a convenient creature of the people, deriving its consent from them. Even the sober-minded delegates to

11. Beard, *The Rise of American Civilization*, Vol. I, p. 239.

the Constitutional Convention of 1787, whose disappointing experiences with the Articles of Confederation convinced them of the necessity for strong central government, thought in terms of Montesquieu's theories with respect to the "separation of powers,"¹² so that all united with Alexander Hamilton's statement¹³ that "the accumulation of all powers, legislative, executive and judicial, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed or elected, may justly be pronounced the very definition of tyranny." But while the American colonies justified their independence upon grounds revolutionary, and carried the fanfare of freedom into the Constitutional Convention, the practical minded representatives, lawyers, businessmen and property owners, became so absorbed in the machinery of a government kindly disposed to the interests of trade and commerce, that they wrote in large letters a brilliant constitution which failed, significantly, to include a Bill of Rights. When the constitution became a completed document, its framework reflected a governmental system quite difficult of capture by any transient majority—a far cry from the right to revolt which the Declaration of Independence had expressed. Professor Beard's "Economic Interpretation of the United States Constitution"¹⁴ has lucidly analyzed our Federal constitution as a document spread with the scattered ink of Colonial America's dominant economic interests. The constitution was careful to guarantee contract obligations against state interference,¹⁵ and property rights in slaves were protected by a prohibition against interference with their importation until 1808.¹⁶ Popular sovereignty was so

12. Montesquieu, *Esprit de Lois*, liv. ix, chap. vi. In fact, however, it is conceded today that our founding fathers misconceived Montesquieu's theories, for he advocated the placing of ultimate power in the hands of only two departments, i. e., the legislative and the executive. The judiciary was to be independent, to be sure, of the other departments

of government, but not equal in point of power to the executive and the legislative. See J. W. Burgess *Recent Changes in American Constitutional Theory* (1923)

13. *The Federalist*, No. 47.

14. MacMillan, 1935.

15. Article I, section 10.

16. Article I, section 9.

far distrusted that United States Senators were required to be elected by the respective state legislatures instead of by popular vote.¹⁷ Rousseau's conception of equality was in the mouths of the orators of the day, but a practical calm had settled over the daily affairs of the new nation. The social interest in the general security and in the respect for commercial transactions had placed a shroud over the "anarchism" of natural right theories.

There are tantalizing images called forth by the imagined history of an America governed by a political theory akin to that of the legislatively omnipotent England. The battles of conflicting interests might have been fought out in America in legislative halls, rather than in judicial forums; but the fortuities of Chief Justice Marshall's presence, and the absence of a clearly stated position in our Constitution gave rise to the American Doctrine of Judicial Supremacy. *Marbury v. Madison*¹⁸ constituted the United States Supreme Court the ultimate power in the realm of constitutional law. An imposing array of arguments were set forth by Marshall to justify the extraordinary assumption of powers.¹⁹ Specifically, four reasons were assigned by the Chief Justice: (1) since the constitution is a document superior to private law, legislation in violation thereof must be declared void; (2) the notion of a constitution necessitates the assumption of power by the judiciary; (3) the judge's oath to support the constitution required his assumption of the power; (4) the language of the constitution required his assumption of the power. It has been suggested—and the suggestion has been verified by the subsequent course of judicial decision²⁰—that

17. Article I, section 3. This section, however, was changed, as is known, by amendment to the constitution, which provides for the popular election of senators.

18. 1 Cranch 137, 2 L. Ed 137 (1803).

19. *c/f Eakin v. Rauh*, 12 Sergeant & Rawles, where Justice Gibson argues the fallacies of Chief Justice Marshall's arguments in *Marbury v.*

Madison, to the effect that all beg the very question at issue. Moreover, the absence of a clearly expressed grant of power to the judiciary in the constitution is cogent evidence against the assumption, in view of the awful importance of the assumed power.

20. Most immediately after the *Madison* case, in point of blunt expression of natural law theories, came *Ogden v. Saunders*, 12 Wheat.

the true bases underlying the doctrine of judicial review were, first, a distrust of legislative power; second, the protection of minorities, and third, the protection of private property.²¹ Outstanding postulates, all, of natural law theory. The terms used were "due process" and "vested" rights instead of inherent, unchangeable and "natural" rights. The ideological approach, however, was identical. The centuries of natural rights thought had culminated in an effective political theory possessed by the dominant economic interests: a legislative act could not aspire to the dignity of valid law, if violative of *jus naturale*. Locke's respect for those who had mingled their efforts with the natural resources to obtain thereby a vested right found sympathetic understanding in the United States Supreme Court,²² first through a still unexplained extension of the constitutional prohibition against state interference with contract obligations²³ and then through redefinition of "due process of law" as found in the fifth and fourteenth amendments to the constitution, from a simple rule of procedure to a drastic limitation upon legislative power.²⁴ "The right

213, 6 L Ed 606 (1827), where Marshall said "The framers of our constitution were intimately acquainted with those wise and learned men, whose treatises on the law of nations have guided public opinion in the subjects of obligation and contract."

21. Haines, *A Revival of Natural Law Concepts in State and Federal Judicial Decision*, pp 82, 83.

22. "The doctrine of vested rights represents the first great achievement of the courts after the establishment of judicial review." Edward S. Corwin, *A Basic Doctrine of American Constitutional Law*, 12 Mich L Rev 247 (1914).

23. I. e., in the line of cases outstandingly illustrated by *Fletcher v. Peck*, 6 Cranch 87, 3 L Ed 162 (1810) and *Dartmouth College v. Woodward*, 4 Wheat. 518, 4 L Ed 629 (1819).

24. In early American law due process meant merely procedural protection against arbitrary arrest and imprisonment. In 1876, *Cooley* first extended the term to taxation cases. "How has due process of law come to take a central place in American constitutional law? It was the uncanny intuition of the justices in state and federal courts, we are told, which discovered a new rôle, for due process of law. Searching for the 'inherent elements of justice' applicable to all situations, the judges extracted, from the vague terms of written charters, a latent and unsuspected meaning which conservatives and reactionaries alike were seeking—an effective device to check popular law-making and to resist arbitrary administrative procedure." Haines, *A Revival of Natural Law*

to follow any of the common occupations of life is an inalienable right," stated the United States Supreme Court in *Allgeyer v. Louisiana*.²⁵ "It was formulated as such," continued the court, "under the phrase 'pursuit of happiness' in the Declaration of Independence. . . . The right is a large ingredient in the civil liberty of the citizen."

Article IV, Section 2 of the Federal Constitution provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several states." Popularity of natural law categories impelled Justice Washington of the United States Supreme Court to think that this Section created a group of rights of citizens of the United States which guaranteed to them, by virtue of their inherent rights possessed as a citizen of the State, the recognition of this group of rights by every other State.²⁶ Such a view of the "privileges and immunities" phrase appears to have been accepted in several United States Supreme Court cases,²⁷ but other and more recent holdings by that Court have repudiated the view.²⁸ Article IV, Section 2, "does not import that a citizen of one State carries with him into another fundamental privileges and immunities which come to him necessarily by the mere fact of his citizenship in the State first mentioned, but, on the contrary, that in any State every citizen of any other State is to have the same privileges and immunities which the citizens of that State enjoy. The Section, in effect, prevents a State

Concepts in State and Federal Judicial Decision, p. 406.

25. 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897).

26. See *Carfield v. Coryell*, 4 Wash. CC 371, Fed. Cas. No. 3,230.

27. *Slaughter House Cases*, 16 Wall. 36, 21 L.Ed. 394 (1873); *Maxwell v. Dow*, 176 U.S. 581, 20 S.Ct. 448, 44 L.Ed. 597 (1900); *Canadian N. R. Co. v. Eggen*, 252 U.S. 553, 40 S.Ct. 402, 64 L.Ed. 713 (1920).

28. *Downham v. Alexandria*, 10 Wall. 173, 19 L.Ed. 929 (1870); *Cham-*
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bers v. Baltimore & O. R. Co., 207 U.S. 142, 28 S.Ct. 34, 52 L.Ed. 143 (1907); *LaTaurette v. McMaster*, 218 U.S. 465, 39 S.Ct. 160, 63 L.Ed. 302 (1919); *Chalker v. Birmingham & N. W. R. Co.*, 249 U.S. 522, 39 S.Ct. 366, 63 L.Ed. 748 (1919); *Shaffer v. Carter*, 252 U.S. 37, 40 S.Ct. 221, 64 L.Ed. 445 (1920); *United States v. Wheeler*, 254 U.S. 281, 41 S.Ct. 133, 65 L.Ed. 270 (1920); *Douglas v. New York, N. H. & H. R. Co.*, 279 U.S. 377, 49 S.Ct. 355, 73 L.Ed. 747 (1920); *Whitfield v. Ohio*, 297 U.S. 431, 56 S.Ct. 532, 80 L.Ed. 778 (1936).

from discriminating against citizens of other States in favor of its own."²⁹

Section 9. Theory of Natural Rights Criticized.

Philosophers and publicists of all ages have sought to reconcile the social interest in the general security with the individual interest in the free life. Natural right thinkers glorified the individual, but if their purpose was the achievement of individual freedom, their design met with terrible miscarriage in the United States at the hands of a theory of vested rights reinforced by a system of law grounded in traditional insistence upon property rights. The proposition that free development of man's acquisitive instinct—a postulate of natural law thought—should lead to the general happiness,³⁰ has fallen upon bad times in countries where the unemployed number millions, where those employed fill the press with strikes and boycotts in expression of a myriad of alleged ills against rude and sometimes inhuman treatment. We owe much to the natural right thinkers, for they approached the social scene from the viewpoint of the individual; democracy, at which Carlyle scoffed as the "despair of finding heroes," was to the natural rights school the crowning achievement of man's upward struggles for human dignity. It is not entirely fair to say that the whole subject of natural law is grounded in man's fascination for the superlative, for theirs was unequalled grandeur of earnestness, when natural law thinkers contended that society should reflect its composition of individuals because, in the final analysis, it is simply composed of individuals.

But the cores and hence the consequences of natural law thinking are untrustworthy. On the one hand, man never lived in a state of nature except, perhaps, as a beast of prey. On the other hand, assumptions which proceed upon an alleged state of nature are impervious alike to the needs and the problems of a dynamic society. It is customary to dis-

²⁹. *Hague v. Committee for Industrial Organization*, 307 US 496, 59 S Ct 954, 83 L Ed 1423 (1939).

³⁰. The underlying thesis of Adam Smith's landmark work, "The Wealth of Nations."

parage Plato's "Republik" and Sir Thomas More's "Utopia" as works too imaginary to accomplish a balance of social conflicts, but at least their fundamental conceptions related to man in actual society, rather than in a state of nature. Similarly we may respect the conclusions of comparative sociology or comparative law, where research unfolds characteristics, mores, rules or principles common to people differently constituted. Natural right men of learning fled instead to the desert, there to discover and to bring back the arid soil of abstract speculation to govern the social nuances of men in daily life.

Some natural-right thinkers have identified the individual right with the social good, upon the theories either that the natural right must necessarily be the group ideal (Rousseau, Locke), or that social investigation will bear out the claim (Grotius, Leibniz). Both theories require for their substantiation at least some measure of factual support in social circumstance—a requirement which destroys the "higher basis" of thinking about rights and with it the entire system of natural-rights speculation. Moreover, there is a variance between pleading and proof. The proclaimed right to grow industrially big through exercise of individualist prowess, has all but destroyed our middle class. A formidable bloc of American opinion holds that the preservation of the middle class is necessary to maintain democratic society. Here is no support for the socially minded natural-right thinker. Nor can we point to the economic and moral poverty of the wholly unorganized working class at the middle of the nineteenth century as the reflection of a socially desirable result of free employer enterprise. Finally, a wealth of legislation of which Workmen's Compensation Acts, Social Security Legislation, Housing Laws and Fair Labor Standards Acts are but some outstanding illustrations, has given the sanction of law to propaganda designed to remedy some of the deplorable results of unhindered individualism of the natural-right sort.

A sensible theory about present-day rights must consequently follow, with tractable activity, the whole play of the social scene. Metaphysical absolutism is a wretched

springboard for social analysis. It is absurd to think of today's capitalist society in terms of Adam Smith's notions about the free man, the free market, and the law of supply and demand. The worker's freedom to contract for his services is too often the burden of dependency upon the will of his employer. The consumer's ignorance of the complex market destroys any benefits expected to accrue from his freedom, while advertising psychology alike with financial devices such as the chattel mortgage and the conditional sale have broadened the realm of the available market to the extent that the law of supply and demand constitutes no trustworthy indicia to determine the limit of a given product's marketability. Dogmas, to be sure, there will always be, for man has a way of insisting upon values above all else. Even the pragmatists, with energies well nigh exhausted from attack upon the metaphysical, the dreamy and the absolute, have been known to contend for a higher individuality toward which the existential ought to conform. Men of intelligence are to be found on both sides of any given fence. It is suggested in this work, however, that the trustworthiness of established dogma is dependent upon social verification, and that the choice which the judiciary will have to make between opposing contentions should reflect a decent regard for the extent of such social verification. Man among men in the twentieth century rather than in an imagined state of nature before the dawn of recorded history should be the method of inquiry and the source of conclusion. There is no inherent right to strike, picket or boycott in the same manner and to the same extent that there is no inherent duty to refrain from striking, picketing or boycotting. It is not wrong to strike, picket or boycott in the sense and to the extent only that it is "right" in terms of social consequences. That is what labor means and ought to mean when it employs the term "right" with respect to an asserted right to engage in any of the forms of labor activity.

Section 10. Labor's Resort to the Theory of Natural Rights.

Labor's tactics in connection with existing law and theory have been twofold: first, to object to their logic and consequences; second, to utilize them when utilization would be to labor's advantage. To the charge of inconsistency, labor replies that the first tactic is the one of choice, the second the product of resignation. It is also insisted that utilization of existing law and theory is necessary to combat the harmful results occasioned by successful employment of existing weapons by those unfriendly to the labor movement.³¹ Accordingly, labor has resorted, as we shall see hereafter, to the injunction.³² And upon these grounds labor has resorted to the otherwise condemned theory of natural rights. Thus the National Labor Relations Board has announced in its second annual report that any limitations upon the right to strike "would no doubt be unconstitutional"³³ Thus too it is asserted that there is an absolute right to picket peacefully, because picketing is simply the exercise of the right to free speech³⁴

Labor has thus far accomplished little, if anything, with its new found friend, the theory of natural rights. Assertion of an absolute "right to strike," or a "right to organ-

31. The lines of distinction involved in labor's tactics have sometimes enmeshed labor leaders in difficulty. See for example, Frankfurter and Greene *The Labor Injunction* (New York 1936) p. 203. "Spokesmen for labor bear considerable responsibility for the confusion which has characterized attempts to formulate the law governing the activities of labor. Its advocates have too often insisted that their only aim is clarification of judicial dicta, correction of misinterpretations by the judiciary, or formal pronouncement of what always has been the law. This approach, however much inspired by the tactics of reform, breeds obscurantism. It is time to repudiate diplomatic disingenuous-

ness and to rely upon the tactics of candor. In the main, law reflects the requirements of civilized society as the judges in a particular period conceive them. When change is sought, legislatures should be frankly informed that they are asked to measure social needs differently."

32. See *infra*, Section 31

33. Second Annual Report of the National Labor Relations Board, for the fiscal year ended June 30, 1937, at p. 4.

34. See *Feinberg, Picketing, Free Speech and "Labor Disputes"* (1940), 17 NYU LQ Rev 385. For an extended discussion of the relationship between picketing, and free speech, see *infra*, Sections 135-140

ize," or a "right to picket," has not helped to solve the social problems involved in the labor movement. Moreover, the abstraction of reasoning which has characterized property natural right theories must finally pervade and has already pervaded labor's climate of opinion with a consequent deadlock between opposing theologies insistent upon respective ultimates. A case in point is *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers Union*,³⁵ where labor asserted, in connection with a secondary picketing situation, an absolute right to picket because the right to free speech and nothing more was thereby being exercised. The court conceded the relationship between picketing and free speech, but held the plaintiff's right to do business to be a constitutional right superior in nature to the right to free speech because the latter was merely "given" by the constitution while the former antedated the constitution, which simply "declared" it. Labor's resort to the theory of natural rights has thus simply changed the wrong arena to another wrong arena wherein future battles are to be fought. The rationale of the *Meadowmoor* case has been reiterated in the New Jersey case of *Mitnick v. Furniture Workers Union*.³⁶

³⁵ 371 Ill 377, 21 NE(2d) 308 (1939) cert den 308 US 596, 60 S Ct 128, 84 L Ed 490 (1939).

³⁶ 124 NJ Eq 147, 200 A 553 (1938) appeal dismissed 125 NJ Eq 142, 4 A(2d) 277 (1939) upon the ground that the parties had in the interim effected an adjustment of the

controversy See also *American Federation of Labor v Buck's Stove and Range Co* 33 App DC 83, 32 LRA (NS) 748 (1909), appeal dismissed 219 US 581, 31 S Ct 472, 55 L Ed 345 (1911), *Crosby v. Rath*, 136 Ohio St 352 (1940).

CHAPTER THREE

GROUNDWORKS OF THE AMERICAN JUDICIAL LABOR DECISION (CONTINUED)—THE RIGHT TO A FREE AND OPEN MARKET

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Section 11. Nature of the Right to a Free and Open Market.

Free trade and the doctrine of "restraint of trade" as we know them today were ideas foreign to the body of common law rules and principles as the common law stood prior to the advent of the industrial revolution. Guild restrictions upon forestalling, regrating and engrossing had become part of the common law and statute law of England long prior to the eighteenth century,¹ to be sure, but these restrictions were aimed at the enhancement of prices rather than at any restraints upon free trade.² Mercantilism and the regulatory character of that system inter-

1. IV Blackstone, Commentaries Law Rev 1283 (1939), 40 Columbia Law Rev 158 (1940), at pp 24-25. It

2. See Boudin, The Sherman Act and Labor Disputes, 39 Columbia Law Rev 158 (1940), at pp 24-25. It has been pointed out that the statutes aimed at penalizing, forestalling,

vened between the stagnant trade periods of feudal and middle ages and the extension of enterprise which we call the industrial revolution. The grant of monopolies was a regular practice of government prior to the eighteenth century.³ But bargains entered into by a man in restraint of his right to pursue his trade were very early declared to be illegal in the sense that no remedy would be afforded by law for the enforcement of such bargains.⁴ The anomalous result was that while the individual was protected against the consequences of his own contract, he was not likewise protected against harm to his trade which combinations or monopolies could perpetrate. The explanation lies in the fact that monopolies could be attacked as an interference with the crown's exclusive right. Moreover, to the extent that the anomaly existed, it was the reflection of economic conditions which called for protection in the one case, while not calling for protection in the other case because of the lack of need therefor. With the decline of mercantilism, the abolition of the crown's monopoly prerogative, and the emergence of free trade, there came into being a propaganda in behalf of the free and open market which soon transformed English economic life, and it is this life which in turn found its way into the common law. The entrepreneur's right to a free and open market soon became an undisputed common law right, and anything in restraint of that right became a wrong. The entrepreneur's right to the free and open market has sometimes been described as a right to a "probable expectation."⁵

Here, then, is the basis of illegality with which combination must contend. The harm to one entrepreneur's business which another entrepreneur might inflict in the course

regating and engrossing were generally confined to necessities of life. Eddy on Combinations, p. 45

3. See Price, *The English Patents of Monopoly* (1 Harvard Econ Series).

4. Y. B. 2 Hen V, Pl. 26, (c 1415). See Williston on Contracts (Rev Ed) Secs. 1634, 1635; *Mogul Steamship*

Co v McGregor [1899] LR 23 QBD 508. The rule against perpetuities is a further early example of common law unfriendliness to restraints

5. *Pitt v Donovan*, 1 Maule & S. 639, 105 Eng Rep 238 [1913]. *Allen v. Flood* [1893] AC 1, 17 Eng Rul Cas 285.

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of his business is *damnum absque injuria*. Each is pursuing his own right. Intrinsic in the pursuit of an enterprise by one is the possibility of harm to another through restriction of his opportunities at profit. The assumption is that competition is worth so much to society as to justify the infliction of damage by one entrepreneur upon another. But the restrictions upon individual enterprise which a combination is able to achieve stands upon a different basis. Gone under such circumstances or at least unduly restricted is access to the free and open market. The difference between the extent to which an entrepreneur's access to a free and open market is restricted by the competing activities of another entrepreneur as distinguished from the activities of a combination is not simply quantitative but qualitative. Competing entrepreneurs are engaged in the battle of free trade, while entrepreneurs in combinations are engaged in restricting the circumstances under which the battle may be carried on. Combinations are criminal or tortious not simply because two or more are assumed to be able to accomplish greater harm than can one. The point of interest is the right to the free and open market, and the query is: Is that right restricted other than by competing activities?

The cases have been uniform in recognizing the right to the free and open market. In a leading case on the subject, *Alfred W. Booth & Company v. Burgess*,⁶ the court stated the right in the following terms: "We have the right to a free market, which is the right of every dealer, in the full enjoyment of his right to contract, to have all other possible dealers with him left free to deal or not, as they may voluntarily elect . . . the tort exhibited by the violation of the right to a free market consists in coercing the market, i. e., interfering with the right of a particular dealer to enjoy the advantages of freedom to deal with him on the part of all who may voluntarily desire to deal with him."⁷

6. 72 NJ Eq 181, 65 A 226 (1906).

7. See for cases to the same effect, *Iron Molders' Union v. Allis Chalmers Co.* 122 F.2d 91, 91 CCA 631, 20 LRA

(NS) 315 (CCA 7, 1908); *American Federation of Labor v. Buck's Stove & Range Co.* 33 App DC 83, 32 LRA (NS) 748 (1909), appeal dismissed

Section 12. Right is Employee's as Well as Employer's.

The right to a free and open market has been uniformly recognized to be a right enjoyed by employee as well as one enjoyed by employer. In *Vegelahn v. Guntner*,⁸ the court recognized this fact in the following language: "An employer has a right to engage all persons who are willing to work for him, at such prices as may be mutually agreed upon, and persons employed or seeking employment have a corresponding right to enter into or remain in the employment of any person or corporation willing to employ them." In the oft-cited English case of *Quinn v. Leatham*,⁹ the court said: "According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same for all persons, whatever their callings; it applies to masters as well as to men; the proviso, however, is all important, and it also applies to both, and limits the rights of those who combine to lock out as well as the rights of those who strike."¹⁰ While the employee's right to a free and

219 US 581, 31 S Ct 472, 55 L Ed 345 (1911), *Emack v. Kane* 34 F 47 (CC ND Ill. 1888); *Purington v. Hinchliff*, 219 Ill 159, 76 NE 47, 2 LRA(NS) 824, 109 Am St Rep 322 (1905); *L. D. Willcutt & Sons Co. v. Driscoll*, 200 Mass 110, 85 NE 897, 23 LRA(NS) 1236 (1908); *Vegelahn v. Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722 57 Am St Rep 443 (1896); *Martell v. White*, 185 Mass 255, 64 NE 1085, 64 LRA 260, 102 Am St Rep 341 (1904); *Berry v. Donovan*, 188 Mass 353, 74 NE 803, 5 LRA(NS) 899, 108 Am St Rep 499 (1905); *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers Ass'n*, 59 N Eq 49, 46 A 208 (1899); *Jersey City Printing Co. v. Cassidy*, 63 NJ Eq 765, 53 A 230 (1902); *Atkins v. W. A. Fletcher*, 65 NJ Eq 658, 55 A 1074 (1904); *Eureka Foundry v. Lehker*, 13 Ohio S & C P Dec 398 (1902); *Johnston*

Harvester Co. v. Meinhardt, 9 Abb NC 393, 60 How Pr 168 (1880); *Badger Brass Mfg Co v. Daly*, 137 Wis 601, 119 NW 328 (1909); *Lyons v. Wilkins* [1896] 1 Ch 811, 65 LJ Ch NS 601, *Vulcan Iron Works v. Winnipeg Lodge*, 21 Manitoba LR 473 (1911). See also *Keeble v. Hickeringill* [1706] 11 East 574 n (QBD) for an early eighteenth century case in point

8. 167 Mass 92, 44 NE 1077, 35 LRA 722, 57 Am St Rep 443 (1896).

9. [1901] AC 495, 1 BRC 197 See also *Allen v. Flood* [1898] AC 1, 17 Eng Rul Cas 285

10. See also *Goldfield Cons Mines v. Goldfield Miners Union*, 159 F 500 (CCD Nev, 1908); *Mathews v. People*, 202 Ill 389, 67 NE 28, 95 Am St Rep 241, 63 LRA 73; *Plant v. Woods*, 176 Mass 492, 57 NE 1011, 51 LRA 339, 79 Am St Rep 330 (1900); *Gray v. Building Trades*

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open market is thus said to be a right of equal importance and hence entitled to equal protection, however, the courts have not been quick to protect this right in every case. Neither in blacklisting nor in lockout cases has the law been adequate to protect the workingman's right.¹¹

Protection of the workingman's right has been further made difficult by the rule of law which accords to an employer the right to insist upon any "lawful" condition of employment. Thus yellow-dog contracts interfered without legal censure with the employee's right to associate with others into labor unions.¹² Again, employers who coerced employees upon pain of discharge to refrain from dealing with any but company stores have been held legally blameless in so doing, as against the contention of independent storekeepers that their right to a free and open market was thereby impaired.¹³ Statutes enacted in many states which were aimed at the company store and the practice referred to in the preceding sentence,¹⁴ have received narrow con-

Council, 91 Minn 171, 97 NW 663, 103 Am St Rep 477, 63 LRA 750 (1903). *Carter v Oster*, 134 Mo App 146, 112 SW 995 (1908); *Jersey City Printing Co v Cassidy*, 63 NJ Eq 750, 53 A 230 (1902). *Ex parte Boyce*, 27 Nev 229, 75 P 1, 65 LRA 47 (1904); *Purvis v United Brotherhood*, 214 Pa St 344, 63 A 585, 42 Am St Rep 272, 12 LRA(NS) 642 (1906); *State v Stewert*, 59 Vt 273, 9 A 559, 59 Am Rep 710 (1887).

11. See chapter twenty seven, *infra*, for the law governing blacklisting, and especially section 472, analyzing the difficulties in the way of the employee's obtaining redress against blacklisting. Lockouts are discussed at section 83, *infra*.

12. See *Hitchman Coal & Coke Co. v. Mitchell*, 245 US 229, 38 S Ct 65, 62 L Ed 260, LRA1918C, 497, Ann Cas 1918B, 461 (1917). See the index for the various legislative and judicial aspects of the yellow-dog contract discussed in this work.

13. *Guethler v Altman*, 26 Ind App 597, 60 NE 355 (1901); *Lewis v Hue-Hodge Lumber Co*, 121 La 658, 46 S 685 (1908); *Deon v Kirby Lumber Company*, 162 La 671, 111 S 55 (1927); *Heywood v. Tilson*, 75 Me 225 (1883); *Dagostino v Rogers*, 68 Pa Super Ct 284 (1917); *Payne v Western, etc. R. R. Co.*, 13 Lea 507 (Tenn., 1884); *Robison v Texas Pine Land Ass'n* (Tex Civ App) 40 SW 843 (1897); *Reding v Kroll*, 1896, 416 (Trib Luxembourg, 1896). *Contra*, *Graham v St. Charles St. R. R. Co.* 47 La Ann 214, 16 S 806 (1895); *Webb v. Drake*, 52 La Ann 290, 26 S 791 (1899) (where the rationale of the decision was the defendant's malice, thereby distinguishing the case from the Louisiana cases to the contrary, *supra*); *Weasley v. Native Lumber Co.* 97 Miss 814, 53 S 346 (1910); *International, etc. Ry. Co. v. Greenwood*, 21 SW 559 (Tex Civ App 1893).

14. See: 1931 Cal Gen Laws

struction.¹⁵ In some cases, however, the employee's right has received protection against closed shop agreements which leave him unemployed,¹⁶ while in others it has been indicated that an employee might succeed in obtaining relief against closed shop agreements which prevent him from securing employment.¹⁷ Labor contends in this respect that such decisions in relation to closed shop agreements are prompted not by any desire to protect the employee's right to a free and open market, but rather by unfriendliness to the closed shop as a restriction of the employer's market.

In general, effective legal protection of the employee's right to a free and open market has been impaired by a judicial frame of mind which looks at the problem from the point of view of the employer's rights. If a right exists in the employer, the harm occasioned to the employee is said to be *damnum absque injuria*. The convergence of natural rights theorizing with the implications of the industrial revolution has impelled a mental outlook not entirely logical, from labor's point of view. Thus, for example, it has been held that a combination of employers to procure the discharge of an employee employed under an at-will con-

(Deering) Art 4717; 1921 Colo Comp Laws, Sec 4170, 1930 Conn Gen Stat Sec 5209, 1927 Fla Gen Laws, Secs 7168, 7169, 1932 Idaho Code Sec 43 602, 1926 Ind Stat (Burns) Secs 9346-9349, 1930 Ky Stat (Carroll) Sec 2738r 2; 1932 La Gen Stat (Dart) Sec 4961, 1924 Md Code (Bagby) Art 24, Sec 248, 1932 Mass Gen Laws, c. 149, Sec 25, 1929 Mich Comp Laws, Secs 8517-8519, 1921 Mont Rev Code, Secs 11223-11224, 1929 N Mex Stat Secs 88-626-618, 619; 1929 Nev Comp Laws, Sec 10472; 1910 NJ Comp Stat p 3047, Sec 105; NY Consol Laws, c. 36, Sec 10; 1932 Ohio Code (Page) Secs 12944, 12946, 1930 Ore Code, Sec 14-801; 1830 Pa Stat (Pardon) c 15, Secs 1574, 1575; 1917 Porto Rico Acts, No. 91, Sec 2, 1932 Tenn Code,

Sec 11361; 1925 Texas Pen Code, Art 1620, 1917 Utah Comp Laws Sec 8413, 1933 Wash Rev Stat (Remington) Sec 10504, 1932 W Va Code, Sec 2354

15. See *Hackney v. Fordson Coal Company*, 230 Ky 362, 19 SW(2d) 989 (1929)

16. See *Plant v Woods*, 176 Mass 462, 57 NE 1011, 79 Am St Rep 330, 51 LRA(NS) 339 (1900); *Bogni v Perrotti*, 224 Mass 152, 112 NE 801, LRA1916F, 831 (1916).

17. See *Wilson v. Newspaper Union*, 123 NJ Eq 347, 197 A 720 (1938). See also *Willis v Restaurant Employees*, 26 Ohio NP(NS) 435 (1927). But see *Williams v. Quill*, 277 NY 1, 12 NE(2d) 547 (1938) appeal dismissed, 303 US 621, 58 S Ct 650, 82 L Ed 601 (1938).

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tract of employment is legally unassailable, because each of the employers, parties to the combination, has the "right" to discharge at-will employees for any reason or no reason at all.¹⁸ Thinking about the problem in terms of the employee's "rights" would have led to a different conclusion. It has also been held that an employer commits no wrong in exacting yellow-dog contracts from employees as a condition of employment, though the employees had theretofore entered into agreements with a labor union not to enter into such contracts.¹⁹ Like interference with an employee's yellow-dog contract by a labor union has been held enjoined.²⁰

It would seem logical to suppose that the employee's right to a free and open market is one which is exclusively the employee's right, on whose behalf neither the employer nor anybody else can act to the exclusion of the power of the employee himself to seek vindication of that right. Nevertheless it has been held in a Maryland case, *Hark v. Green*,²¹ that where an employer sues to enjoin unlawful picketing, his employees may not thereafter likewise sue to enjoin the picketing. It appeared in the *Green* case that the employer had sued to enjoin picketing by negroes whose purpose in picketing was to induce the employer to substitute negro for white employees at the employer's place of business.²² Because the employer had thus brought proceedings against the pickets, the employees' bill was dismissed, the Maryland Court of Appeals saying: "The chancellor held that the bill of the employees was prematurely filed because they knew their employers had determined to resist the demands of the defendants as set out in both bills, and that for this reason their rights and employment were not jeopardized. A

18. See *Lambert v. Georgia Power Co.* 181 Ga 621, 183 NE 814 (1936).

19. *Nolan v. Farmington Shoe Mfg. Co.* 25 F(2d) 906 (DCD Mass 1928)

20. *Hitchman Coal & Coke Co. v Mitchell*, 245 US 229, 38 S Ct 65, 62 L Ed 260, LRA1918C, 497, Ann Cas 1918B, 461 (1917). See section 48, *infra*.

32

21. 168 Md 690, 178 A 600 (1935).

22. *Green v. Samuelson*, 168 Md 421, 178 A 109, 99 ALR 528 (1935). An injunction was granted against the picketing, upon the ground, among others, that such picketing tended to aggravate race controversies. See, for the general problem, *infra*, section 134.

conclusion with which we agree." The employees may have been hasty in bringing on the suit, and it may have been inadvisable or unnecessary for the suit to have been brought, but the decision appears to be incorrect insofar as it holds that the employer's injunction suit in behalf of his own interest in his business was a bar to the employees' similar suit in behalf of their own right. That the employer had determined "to resist the demands of the defendants" may have been persuasive in connection with the necessity for the bringing of the suit by the employees in the first place, but it would seem that they had the legal right to vindicate their own interest in their positions, to the end that, for example, should the employer in the future capitulate to the pickets' demands, the employees would be in possession of an equity mandate against the pickets' interference with the employees' positions which they could employ to protect their positions.

Section 13. Nature of Right to Free and Open Market Frequently Misapprehended.

The conception of the right to a free and open market is one which is frequently misunderstood and more frequently overlooked, with the result that cases passing upon the legality of the strike, picket, boycott, collective bargaining agreement, lockout, blacklist (to take only several of the activities characteristic of the controversies between capital and organized labor) are often wrongly decided, or, where rightly decided, are based upon reasoning whose logic is difficult if not impossible to understand. Reflective of the extent to which the right to a free and open market is the subject of misunderstanding and neglect are the various theories offered to explain or disprove the reason a combination's activities are held to be tortious, although an individual's like activities are held legally blameless. Largely responsible for this misapprehension was the hesitancy of the common law, schooled in traditional remedies, to recognize in plain words and as a new legal

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right, the right to a free and open market,²³ although one of the consequences of the industrial revolution had been to create such a right as a foundation point in the new economic life. Since much of the discussion in point has had reference to the assertion of an absolute right to strike, the statement of the various theories offered to explain the basis of illegality of combined activity will be deferred to the next section. Many of the cases in point also deal with primary boycotts involving concerted refusal to deal or propaganda designed to effect such result. The rationale underlying such cases is the same as that underlying the assertion of an absolute right to strike.

Section 14. Assertion of Absolute Right to Strike and to Engage in Peaceful Boycott.

There is a school of thought which contends for an unlimited right to strike at common law, and a corresponding unlimited right to engage in a primary, peaceful boycott. How can combination, it is asked, change the character of an act? It is denied that mere combination can constitute criminal or tortious, acts which each member of the combination is free to do. The right to quit in a group, it is insisted, should be as unquestioned as the right of the employer to discharge his men in a group. The foregoing reasoning was forcibly set forth in the case of *Lindsay & Co. v. Montana Federation of Labor*,²⁴ as follows: "There can be seen running through our legal literature many remarkable statements that an act perfectly lawful when done by one person becomes by some sort of legerdemain criminal when done by two or more persons acting in concert and this upon the theory that the concerted action amounts to a conspiracy. But with this doctrine we do not agree. If an individual is clothed with a right when acting alone, he does not lose **such a right** merely by acting with others, **each of whom is clothed with the same right.** If the act done is lawful, the combination of several persons to commit it does not render it unlawful. In other

^{23.} See Kennedy and Finkelman, *The Law of Tort* (Toronto, 1933).
The Right to Trade: An Essay In ^{24.} 37 Mont 264, 66 P 127 (1908).
34 [1 Teller]

words, the mere combination of action is not an element which gives character to the act."

And in the case of *Jersey City Printing Co. v. Cassidy*,²⁵ the same contention was advanced and answered in the following language: "I am unable to discover any right in the courts, as the law now stands, to interfere with this absolute freedom on the part of the employer to employ whom he will and to cease to employ whom he will, and the corresponding freedom on the part of the workmen of their

25. 63 NJ Eq 759, 53 A 230 (1906). To the same effect are the following cases: *Union P R Co v Ruef*, 120 F 102 (CCD Neb, 1902); *Lambert v Georgia Power Co* 181 Ga 621, 183 NE 814 (1936); *Woodruff v Hughes*, 2 Ga App 361, 58 SE 551 (1907); *Hey v Wilson*, 232 Ill 389, 83 NE 928 (1908); *Ulery v Chicago Stock Exchange*, 54 Ill App 233 (1894); *Clenutt v Watson* 14 Ind App 38, 42 NE 367 (1895); *Karges Furniture Co v Amalgamated W U. L* 165 Ind 421, 75 NE 877 (1905); *Baker v Metropolitan Life Insurance Co* 23 Ky L 1174 64 SW 913 (1901); *Trimble v Prudential Life Ins Co* 23 Ky L 1184, 64 SW 915 (1901); *Brewster v C. Miller's Sons Co* 101 Ky 368, 41 SW 301 (1897); *Orr v Home Mutual Ins Co* 12 La Ann 255 (1857); *Kimball v Harmon* 34 Md 407 (1871); *Bowen v. Matheson*, 14 Allen 499 (Mass 1867); *Opera House Co v Minneapolis Musicians*, 118 Minn 410 136 NW 1092 (1912); *Bohn Mfg Co v Hollis*, 54 Minn 223, 55 NW 1119, 21 LRA 337, 40 Am St Rep 319 (1893); *Hunt v Simonds*, 19 Mo 583 (1854); *Empire Theatre Co. v. Cloke*, 53 Mont 183, 163 P 107, LRA1917k, 383 (1917); *Foster v. Retail Clerks Int'l Protective Assn.* 39 Misc 48, 78 NYS 860 (1902); *Mills v U. S Printing Co.* 99 AD 606, 91 NYS 185 (1904); *Roddy v. United Mine Workers*, 41 Okla 621, 139 P 120

(1914); *Cote v. Murphy*, 159 Pa 420, 28 A 190, 23 LRA 135, 39 Am St Rep 686 (1894); *Macaulay v Tierney*, 19 RI 255, 33 A 1 (1895); *Delz v Winfree*, 80 Tex 400, 16 SW 111 (1891); 6 Tex Civ App 11, 25 SW 50 (1894); *West Va Trans Co v. Standard Oil Co* 50 W Va 611, 40 SE 591 (1902); *Gebhardt v Holmes*, 149 Wis 423 135 NW 860 (1911); *Mogul Steamship Co v McGregor*, AC 25 [1892]

Combinations by employers to blacklist are commonly held legally blameless because each employer, party to the blacklist, being concededly possessed individually of a right at common law to discriminate in hiring and discharging between union and non-union men is said to be free to combine for the same purpose. *Boyer v Western Union Tel Co* 124 F 246 (CCFD Mo 1903); *New York, Chicago & St Louis R R Co v Scheffer* 65 Ohio St 414 62 NE 1036 (1902)

Combinations among employers to procure the discharge of employees employed under at will employment contracts have likewise been held non-actionable upon the ground that the employers had the right individually to discharge the employees for any reason, or no reason at all. See *Lambert v. Georgia Power Company*, 181 Ga 621, 183 SE 814 (1936); *Woodruff v. Hughes*, 2 Ga App 361, 58 SE 551 (1907).

own free will, to combine and meet as one party, as a unit, the employer who, on the other side of the transaction, appears as a unit before them. Any discussion of the motives, purposes or intentions of the employer in exercising his absolute right, to employ or not to employ as he sees fit, or of the free combination of employees in exercising the corresponding absolute right to be employed or not as they see fit, seems to be in the air."

Indeed the arguments alleged against the holding that combination per se creates illegality are imposing at first blush. The forceful contention that whatever one may do alone he may do in combination with others, is coupled with the point that the doctrine "tends to rob the law of predictability, and to make justice depend too often upon the chance prejudices and convictions of individual judges,"²⁶ and "because under its cover judges are often free to legislate or to decide great social issues largely in accordance with their personal convictions."²⁷ Mention is also made of the fact that it is unknown to other great systems of law, such as the Roman Law, and Modern Continental Law.²⁸ Nor is it known to the present English law, which provides that a combination of two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute is not indictable as a conspiracy or actionable, unless such act, if done without such combination, would be indictable or actionable,²⁹ except as to certain strikes declared illegal by the Act of 1927,³⁰ that is, a strike which "(1) has any object other than or in addition to the furtherance of a trade dispute within the trade or industry in which the strikers are engaged, or (2) is designed or calculated to coerce the government either directly or by inflicting hardship upon the community." In response to

26. Sayre, *Criminal Conspiracy* (1922) 35 HARV L REV 393, 427.

27. *Ibid.*, p. 427.

28. *Ibid.*, p. 427.

29. *Trade Disputes Act*, 1906, c. 6 Edw VII, c. 47, Sec. 3. The notion of the legality of combination upon the theory that the members of the

combination are but doing collectively that which they individually have the right to do was first introduced into English labor legislation by Statute 38 & 39, Vict c. 86, enacted in 1875.

30. *Act of 1927*, 17 & 18 Geo V, c. 22

propaganda designed to secure legislation recognizing the legality of combination upon this theory, several states have enacted statutes providing that combined labor activity shall be considered illegal only if individuals would, if carrying on corresponding labor activity, be held to have transgressed the bounds of legality.³¹

The mold of American law has generally developed in apparent disregard, however, of arguments seeking to justify private collective action. American courts have generally looked askance upon the organized attempt by labor to assert an absolute right to strike. The general rule has been tersely stated in *State v. Stockford*³² to the effect that "A strike may be lawful or it may be unlawful and criminal. Whether it is lawful or not depends upon its object and the manner in which it is conducted," and in *De Minico v. Craig*³³ as follows: "Whether the purpose for which a strike is instituted is or is not a legal justification is a question of law to be decided by the court. To justify interference with the rights of others the strikers must in good faith strike for a purpose which the court decides to be a legal justification for such interference." Even such an independent thinker as Mr. Justice Brandeis has stated categorically that "Neither the common law nor the Fourteenth Amendment confers the absolute right to strike."³⁴ The full sanction of the criminal law has been placed at the disposal of aggrieved entrepreneurs. Courts of equity have issued mandates of injunction restraining labor from acting in unison. Legislature, executive and judiciary have united to condemn, to police and to punish workingmen's combinations found to be instinct with a purpose to accomplish an assertedly socially harmful object. The great prepon-

31. California (Cal Gen Laws [Henning, 1920] p 1903), Maryland (Md Ann Code [Bagby, 1924] p. 1884) and Oklahoma (Okla Comp Stat Anno [Bunn, 1921] p 7621) have passed laws modelled after the English statute. In California, however, the court has held the statute to be inapplicable to the law of civil

conspiracy. *Rosenberg v. Retail Clerks Association*, 39 Cal App 67 (1918).

32. 77 Conn 227, 58 A 769, 107 Am St Rep 28 (1904).

33. 207 Mass 593, 94 NE 317, 42 LRA(NS) 1048 (1911).

34. *Dorchy v. Kansas*, 272 US 306, 47 S Ct 86, 71 L Ed 248 (1926).

derance of judicial authority holds that individually blameless acts may become illegal if done in combination.³⁵ The reasons advanced to explain this disregard by the common law of that which to some courts and writers appear to be unassailable logic are varied and interesting, but in the main beside the point.³⁶ And because they are beside the

35. *Federal Trade Commission v. Raymond Bros. Clark Co.* 263 US 565, 44 S Ct 162, 68 L Ed 448 (1924); *Arthur v. Oakes*, 63 F 320, 25 LRA 414, 11 CCA 209 (CCA 7, 1894); *Toledo, etc. R. Co. v. Pennsylvania Co.* 54 F 746 (CC ND Ohio, 1893), *Oxley Stave Co. v. Coopers' International Union*, 72 F 695 (CCD Kan, 1896), *aff'd* 83 F 912 (1897), *Albion Chalmers Co. v. Iron Molders' Union*, 150 F 155 (CC ED Wis, 1906); *Loewe v. California State Federation of Labor*, 139 F 71 (CC ND Cal, 1905), *Hills Bros. v. Fed. Trade Commission*, 9 F(2d) 481 (CCA 9, 1926), *Vallejo Ferry Co. v. Solano Aquatic Club*, 165 Cal 255, 131 P 864 (1913), *Connors v. Connolly*, 86 Conn 641, 86 A 600, 45 LRA(NS) 564 (1913), *State v. Ghadden*, 55 Conn 46, 8 A 890 3 Am St Rep 23 (1887); *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla 969, 43 S 590 (1907), *Barnes v. Chicago Typographical Union*, 232 Ill 424, 83 NE 940, 14 LRA(NS) 1150, 122 Am St Rep 129 (1908); *Kemp v. Division No. 241*, 255 Ill 213, 99 NE 389 (1912); *Pickett v. Walsh*, 192 Mass 572, 78 NE 753, 6 LRA(NS) 1067, 116 Am St Rep 272, 7 Ann Cas 638 (1906); *Martell v. White*, 185 Mass 255, 64 NE 1085 (1904); *Berry v. Donovan*, 188 Mass 353, 74 NE 603, 5 LRA(NS) 599, 108 Am St Rep 499, 3 Ann Cas 738 (1905); *Haverhill Strand Theatre v. Gillen*, 229 Mass 413, 118 NE 671, LRA1918C, 813 (1918); *Baldwin v. Escanaba Liquor Dealers' Assn* 165 Mich 98, 130 NW 244 (1911); *Lohse Patent Door Co. v. Fuelle*, 215 Mo 421, 114 SW 997,

22 LRA(NS) 607, 128 Am St Rep 492 (1908), *State v. Dalton* 134 Mo App 517, 114 SW 1132 (1908), *Bausbach v. Reiff*, 244 Pa 559, 91 A 224 (1914); *Patterson v. Building Trades Council*, 11 Pa Dist R 500 (1902), *Cote v. Murphv*, 159 Pa 420, 28 A 190 (1894), *Bailey v. Master Plumbers Assn* 103 Tenn 99, 53 SW 853 (1899), *State ex rel Durner v. Huegin*, 110 Wis 189, 85 NW 1046 (1901); *Moore v. Bricklayers Union*, 10 Ohio Dec Rep 665 (1889), *Alfred W. Booth and Bros. v. Burgess*, 72 NJ Eq 181, 65 A 226 (1906), *Mogul S. S. Co. v. McGregor* [1889] LR 23 QB Div 598 (1892) AC 25, *Walsby v. Anley* [1861] 3 El & El 516 121 Eng Rep 536, *Temperton v. Russell* [1893] 1 QB 715, 62 LJ QB NS 412, 4 Reports, 376, 69 LR NS 78, 41 Week Rep 565, 57 JP 676, *Boots v. Grundy* [1900] 82 LTNS 769, *Leathem v. Craig* [1899] 2 Ir R 667; *Quinn v. Leathem* [1901] AC 495, 1 BR Cas 197; *Giblan v. Nat'l Amal. Labor U.* [1903] 2 KB 600, 1 BR Cas 528. See also *Anderson v. Shipowners*, 272 US 359, 47 S Ct 472, 71 L Ed 298 (1926) where the United States Supreme Court said "A restraint of interstate commerce cannot be justified by the fact that the object of the participants in the combination was to benefit themselves in a way which might have been unobjectionable in the absence of such restraint."

36. The careful Mr. Justice Holmes, dissenting in *Vegeahn v. Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722, 57 Am St Rep 443

point, they have lent credence to the arguments advanced in many courts and by many courts, that the law of criminal and civil conspiracy, and the labor injunction, are baseless and illogical. Failure to appreciate that what is sought to be protected is the right to a free and open market in a competitive economic order, and insistence by courts upon these varied and interesting but inconclusive grounds to explain the illegality of combination have been sources of confusion from which the common law has suffered immeasurably. We shall take up in order the several grounds offered to explain the difference between the legal doctrine applicable to the activity of an individual, and that applicable to the activity of a combination.

Section 15. View that Combination Is Unlawful Because of Enhanced Power to Do Harm.

"It may be stated as a general proposition," said the court in *State v. Dalton*,³⁷ "that where an additional power or enhanced ability to accomplish an injurious purpose arises by virtue of the confederation and concert of action, an element of criminal conspiracy is thereby introduced which will render sufficiently criminal either the means or the purpose otherwise merely unlawful to sustain a conviction, although the means or the end were not such as are indictable if performed by a single individual."³⁸ With this

(1896) refused to subscribe to the general statement, without explanation for the generalization that acts of a combination are essentially different from acts done by a single individual. "But there is a notion, which latterly has been insisted on a good deal, that a combination of persons to do what any one of them lawfully might do by himself will make the otherwise lawful conduct unlawful. It would be rash to say that some as yet unformulated truth may not be hidden under this proposition. But, in the general form in which it has been presented and accepted by many courts, I think it is

plainly untrue both on authority and on principle."

37 134 Mo App 517, 535, 114 SW 1132 (1908).

38. To the same effect see: *Arthur v. Oakes*, 63 F 320 25 LRA 414, 4 Inters Com Rep 744, 11 CCA 209, 24 US App 239 (CCA 7, 1894); *State v. Glidden*, 35 Conn 46 8 A 890 (1887); *Commonwealth v. Hunt*, 4 Met 111, 38 Am Dec 346 (Mass 1842); *Alfred W. Booth & Bros. v. Burgess*, 72 NJ Eq 181, 65 A 226 (1906); *Com ex rel. Chew v. Carlisle* (1821) *Brightly* (Pa) 36; *Bailey v. Master Plumbers' Asso* 103 Tenn 99, 63 SW 853 (1899), *Crump v.*

view, there are two difficulties. In the first place, it does not explain the wrong which this "additional power or enhanced ability to accomplish an injurious purpose" is capable of perpetrating, or, conversely, the right which is wronged. It is not every combined act which is unlawful. It is only such combined act which, because of the combination, becomes unlawful. The right to a free and open market is impaired, and this is necessarily so, by the assertion of everybody else's similar right. But everybody else is not thereby engaged in committing a wrong. The illegality which resides in combination is found in the impairment of the right to a free and open market. The difference is qualitative not simply quantitative. "A grain of gunpowder is harmless, but a pound may be highly destructive" said Lord Brampton in *Quinn v. Leatham*.³⁹ The purpose was to show why combined acts are treated differently in law from individual acts. The fallacy could not more clearly have been stated; in both instances gunpowder was involved in the illustration. The vice inherent in combination is the doing of harm not greater than but rather different from the harm occasioned by the competitive activities of individuals.

In the second place, the view is not realistic. A single large enterprise is capable of destroying the business and good will of a smaller and less efficient enterprise, with much greater ease than can a combination of small entrepreneurs.⁴⁰ In one case, however, destruction is accomplished in the battle of free trade. In the other it is accomplished by a battle against free trade.

Commonwealth, 84 Va 927, 6 SE 620 (1888); *State ex rel. Durner v. Huegin*, 110 Wis 189, 85 NW 1046 (1901).

39. [1901] 85 LTR 289

40. "It is certainly true that the commission of acts by a combination of persons may change their character to the extent of making them

more offensive and harder to resist. But it is also true that under modern economic conditions one person may, because of his situation, be able to inflict far more loss on his competitors or on the public than any number of persons combined for that purpose." *McWilliams*, 41 *American L Rev* 337.

Section 16. View that Combined Harm Obviates the Rule De Minimis.

It has been asserted that harm resulting from competition is always unlawful, but that the stamp of illegality is not placed upon ordinary competitors because the law, being unconcerned with trifles, is unwilling to assess damages. Such, apparently, is the reasoning upon which the court in *Lohse Patent Door Co. v. Fuelle*⁴¹ distinguished between the liability of a combination for acts which, if done by an individual, would go unpunished. This is patently absurd. The harm incident to competition is *damnum absque injuria*. No legal wrong is done by one competitor against another when, in the battle of trade, one fails while the other flourishes. The evil of combination is not the multiplicity of minimal wrongs, but the creation of a wrong, impairment of the right to the free and open market. Moreover, here again the harm which can come to a less efficient enterprise by the competitive activities of a larger and more efficient enterprise is sometimes much greater than that which combined small enterprises are capable of inflicting.

The Restatement of the Law of Torts has inadequately stated the basis for holding illegal the acts of a combination when individuals doing the same acts would not be considered blameworthy as follows: "Partly this was due to the fact that individual conduct in this sphere was not a problem, whereas concerted action was. Partly it was due to the obvious differences in power between action by individuals and action by combinations of individuals."⁴² The Restatement recognizes, however, "That such differences in power exist is still true with respect to conduct of individuals or groups of individuals acting in concert, although this fact is not ordinarily recognized when the group is regarded as a legal entity."⁴³

⁴¹ 215 Mo 421, 114 SW 997, 22 LRA(NS) 607, 128 Am St Rep 492 (1908). See also *Mogul S. S. Co. v. McGregor* [1892] AC 25.

⁴² Rest Torts (1939) c. 38 (Introductory note)

⁴³ Rest Torts (1939) c. 38 (Introductory note).

Section 17. View that Combined Activity Is Necessarily Violent.

In *Allis-Chalmers Co. v. Iron Molders' Union*,⁴⁴ the court said: "The union of individual forces by agreement, to accomplish injury, gives to such agreement or combination the character of a purpose to reach the end by violence, and the accomplishment thereof the character of a purpose affected by violence." The difficulty with this view is that illegality in connection with combinations is rarely, if ever, based upon a finding of violence. Violent activity is illegal whether done or carried on by one person or by many. How can the view that combined activity is illegal because necessarily violent be reconciled with the doctrine, well settled in the law, that an agreement "in restraint of trade" may be an indictable conspiracy even though nothing be done to carry out the agreement?^{44a}

Section 18. View that Combined Activity Is Necessarily Coercive.

In *Pickett v. Walsh*,⁴⁵ the court said: "It is plain that a strike by a combination of persons has a power of coercion which an individual does not have. The result of this greater power of coercion on the part of a combination of individuals is that what is lawful for an individual is not the test of what is lawful for a combination of individuals." Approval of this view is found in *Kemp v. Division No. 241*.⁴⁶ Involved in this view is a mixture of the notions that a combination is more dangerous because more powerful and that combined activity is necessarily violent. We have already indicated in previous sections the vices which inhere in such notions. The unanswered question which is prompted by all three views is: Just what is it that is being coerced? If it be answered that the right to the free and open market is the factor coerced, then it should be re-

44. 159 F 155 (CC ED Wis, 1906).

45. 255 Ill 213, 99 NE 389 (1912).

44a. See *infra*, section 28.

See also *Huskie v. Griffin*, 75 NH

45. 192 Mass 572, 78 NE 753, 6

345, 74 A 595 (1905); *Chapin on*

LRA(NS) 1067, 116 Am St Rep 272,

Torts (1917) p. 420.

7 Ann Cas 638 (1906).

plied that neither coercion, violence nor enhanced power is needed to explain the basis of illegality, for impairment of the right to the free and open market may be accomplished without the presence of any of these notions. As pointed out by Lord Watson in *Allen v. Flood*,⁴⁷ "coercion, whatever be its nature, must, in order to infer the legal liability of the person who employs it, be intrinsically and irrespectively of its motive, a wrongful act." The competitive world is filled with coercion,⁴⁸ but only that coercion is unlawful which is in restraint of trade.⁴⁹

Section 19. View that Combination Constitutes a Nuisance.

In *Oakes on Labor Law*⁵⁰ the explanation for the illegality of combinations is stated as follows: "The true view appears to be that the tort involved is a nuisance the existence of which is dependent on the degree of annoyance inflicted upon those to whom the plaintiff looks for labor, employment or patronage; and the actionable quality of which depends upon the point at which the right to conduct one's business without interference is to be regarded as ceasing to be merely a permissive right, and becomes also a protected right."⁵¹ There are difficulties with this view. In the first place, to the extent that the nuisance is said to depend upon the "degree of annoyance" involved, it contains the vice of stating in quantitative terms a distinction which, as has been seen, is qualitative. In the second place it seems to assume that all competition is annoyance but that the result thereof is too small for the law to recognize. In this respect it is merely a different way of stating the *de minimis*

47. [1898] AC 1, 17 Eng. Rul. Cas. 245.

48. See *Max Ams Mach. Co. v. Int'l Asso.*, 92 Conn. 297, 102 A 706 (1917).

49. It might be added that there is said to be no such tort as "coercion" (or the equivalent thereof, "duress") known to the common law. Woodward on Quasi Contracts. See § 11. Duress operates to avoid a

contract or transaction or to give a right to recovery of a benefit conferred. But see *Niebuhr v. Gage*, 99 Minn. 149, 108 NW 881 (1906); *Smith v. Bank*, 182 Iowa 1190, 164 NW 762 (1917); note, 39 Harv. L. Rev. 108 (1926).

50. Section 261.

51. Citing *Alfred W. Booth and Bro. v. Burgess*, 72 N.J. Eq. 181, 65 A 226 (1906).

theory heretofore considered. Finally and perhaps most to the point, the view is nothing more than an attempt to explain one vaguely understood notion in terms of another equally vague. For nuisance is one of those words in the law imperfectly understood. In *Cooley on Torts*⁵² nuisance is defined as "an unlawful act or omission constituting an interference with the enjoyment of a legal right." This might better be a definition of a tort in general. In *Melker v. City of New York*⁵³ the court stated quite frankly that "for time out of mind, the term 'nuisance' has been regarded as incapable of definition, so as to fit all cases because the controlling facts are seldom alike, and each case stands on its own footing." Nothing is added by calling combination a nuisance, as a means of explaining the illegality of combination.

Section 20. View that Combination Affects a Public Right.

In *Erle on Trade Unions*⁵⁴ combinations to do acts which would be legally permitted if done by an individual are said to be illegal because of the involvement of public interests: "There are also public interests of great importance in respect of which some combinations for the purpose of violating the public rights therein are crimes, although such violations by an individual alone may not be always indictable. Justice, morality, polity, and trade are examples of such public interests." But when is a public right affected? The answer to this question would depend, in turn, upon an analysis of the public right allegedly involved, which brings us back to the problem which the instant view does nothing to resolve: Why are combinations illegal though formed to do acts which, if done by a single individual, would be perfectly legal?

Section 21. View that Combinations Seek to Achieve the Result of Combined Acts.

In *Albro J. Newton Co. v. Erickson*⁵⁵ the court thus

52. (3d Ed) p 1174

54 p 32.

53. 190 NY 481, 83 NE 565 (1908).

55. 70 Misc 291, 126 NYS 949

sought to explain the illegality of combination: "An act by a single person may be lawful or innocuous. The same act done concurrently by a large number may produce injury to others. A combination for the express purpose of inflicting that injury is made unlawful because of its purpose and object. It is not a combination to do the acts; it is a combination to effect the result of the combined acts." The difficulty with this view is found in the unanswered question which it poses: What legal right is wronged by the doing of the effect of these combined acts?

Section 22. View that Combined Activity Proves Existence of Malice.

In *Patterson v. Building Trades Council*,⁵⁶ the court stated: "Though malicious motives may make a bad act worse, they cannot make that wrong which in its own essence is lawful. Nevertheless, it is equally true that what one alone may lawfully do becomes unlawful when done by a combination of many, where, in doing the act in question, the power of many is used with a malicious motive to control individual freedom of action, to the injury of another or of the public." We shall have much to say about "malice" in subsequent sections.⁵⁷ It will suffice here to state that impairment of the right to the free and open market may be accomplished with or without malice.

Section 23. Reasons for Clarifying Nature of the Right to a Free and Open Market.

We have dwelt in somewhat extended fashion with the right to the free and open market, for the purpose of emphasizing the social interest in preservation of the employer's right to do business and the employee's corresponding right to pursue his calling in a market unimpaired except by the competing activities of other employers and other

(1911), affirmed 144 AD 939, 129 NYS 1111 (1911).

56. 11 Pa Dist R 500 (1902) See *Mogul S. S. Co. v. McGregor*, LR 23 QB Div 598 [1889]; *Sweeny v. Coote*

[1906] 1 Ir R 51; *State ex rel Durner v. Heugin*, 110 Wis 189 85 NW 1046 (1901)

57. See sections 70, 73, 74, *infra*.

employees. Anglo-American labor law cannot be understood with any degree of intelligence, unless the implications of this social interest are grasped. It is unnecessary to construct any specious theory by virtue of which combination is sought to be made the basis of unlawfulness. Combined activity is a single circumstance whose illegality is discoverable in impairment of the right to a free and open market. This disposes of the strike and the boycott. It explains that picketing meets the sanction of the law at the point where impairment of the free and open market is concerned. The conclusion is that, whether the activity is a combined one, as in the case of a strike or boycott, or the doing of an act by a single individual, as in the case of picketing or the interference by a single person with an employment relationship,⁵⁸ the wrong done is the same because the social interest violated is identical.

58. See Kennedy and Finkelman, *the Law of Tort* (Toronto, 1933) pp. 58-92.

CHAPTER FOUR

GROUNDWORKS OF THE AMERICAN JUDICIAL LABOR DECISION (CONTINUED)—DISFAVOR TOWARD LABOR COMBINATIONS

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Section 24. Judicial Unfriendliness to the Activities of Labor Combinations.

"It seems to me," said a judge in a late 19th century case holding picketing illegal per se,¹ "that all unions are governed entirely by foreigners who bring to this country none of the spirit that should actuate the American citizen." The early law looked upon labor unions as officious intruders into the master-servant relationship, in derogation of the employer's natural rights, and his right to the free and open market. It did not seem to have occurred to the judiciary that the labor market was the legitimate concern of the laborer and the labor union. Judicial unfriendliness to the activities of organized labor has found reflection in (1) restrictions, misapplications and in some instances outright disregard of the plain language of state and federal pro-labor statutes, coupled with (2) refusal to apply to labor situations the same rules which the common law applies to non-labor situations. Outstandingly illustrative of the former component is the history of unequal judicial interpretation of the Sherman Act and the misinterpretation of the Clayton Act, a more extended analysis of which is deferred to subsequent pages.² Likewise in point are (1)

1. *Commonwealth v. Silvers*, 11 POC 481 (1892).

2. See sections 187-198, *infra*.

state anti-blacklisting statutes, (2) laws seeking to legalize labor combinations, (3) enactments aimed at sterilizing the effect of the yellow-dog contract, (4) statutes designed to prevent employers from interfering with the right of employees to trade wherever they will, and (5) modern anti-injunction legislation. All these statutory attempts found their source in legislative pro-labor policy. All came before the courts for vindication and enforcement. And all, to greater or less degree, met with judicial treatment of a kind, says labor, which made hollow words of what before had been meaningful legislative declarations.³

Examples of the latter component are numerous. A few will be mentioned here to demonstrate its existence in connection with labor's point of view. With the exception of labor cases, conspiracy is generally inappropriate to the activity of two or more in carrying on an enterprise which each of the participants is legally blameless in carrying on singly.⁴ Contracts of personal services do not come within the purview of the common law rule against restraint of trade, so that combinations in connection therewith are legally unassailable, unless the combination is a labor organization.⁵ Competitors may, if they are not impelled by malice, seek to procure for themselves the services of employees employed under at-will employment contracts, though the competitors have knowledge of the contract and though their purpose is to appropriate to themselves the benefits of the employees' services;⁶ but labor unions which

3. In connection with anti-blacklisting statutes, the point made in the text is stated in greater detail at section 473 *infra*, while as to the other statutes, see sections 455, 456, dealing with the legalizing of labor combinations; sections 459-461, dealing with anti yellow-dog contract acts; section 12, *supra*, dealing with the employee's right to trade; section 436 dealing with anti-injunction legislation.

4. Combinations to blacklist have thus been held legal because each employer is free individually to refuse

to employ union members or sympathizers. See section 472, *infra*. So too, combinations to procure the discharge of employees employed under at-will contracts of employment are held legally unassailable because an employer singly would be privileged to discharge his at-will employee for any reason or no reason at all. See section 472, *infra*.

5. See section 190, *infra*.

6. See *Kemp v. Division No. 241*, 255 Ill 213, 99 NE 389 (1912); *Berry v. Donovan*, 188 Mass 353, 74 NE 603, 5 LRA(NS) 809, 108 Am St

seek to induce employees similarly situated to strike may be enjoined from so doing upon the theory that they are tortiously interfering with the employment relationship, even though their purpose in inducing the strike is not to procure the benefit of the strikers' services, but rather to effect better conditions of employment for them, through collective bargaining.⁷ The common law generally recognizes no such tort as duress, except in labor boycott cases.⁸ Labor unions commit a tort when seeking to induce membership among employees bound by yellow-dog contracts,⁹ yet an employer who, with knowledge of the fact that employees are bound by contracts with a labor union not to enter into contracts antagonistic to the union, insists upon the signing of yellow-dog contracts by such employees as a condition to employment, commits no tort in so doing.¹⁰ Secondary boycotts are legal when carried on by an employers' associations, but not if employed by labor unions in carrying on the industrial struggle.¹¹ Injunctions in cases involving trade disparagement are not issuable because interfering with the right to free speech,¹² but false statements made by strikers, pickets or boycotters are almost uniformly enjoined.¹³ Equity's admitted role is to protect the aggrieved and not to punish the wrongdoers, yet in labor cases the blanket injunction restraining even peaceful labor activity for past unlawfulness is the rule.¹⁴

Judicial hostility to the activities of organized labor,

Rep 499, 3 Ann Cas 738 (1905). See also *Hitchman Coal & Coke Co. v. Mitchell*, 245 U.S. 229, 38 S Ct 65, 62 L. Ed 260, Ann Cas 1918B, 461, LRA 1918C, 407 (1917); Rest Torts (1930) Sec. 768.

7. *Jonas Glass Co. v. Glass Bottle Blowers' Association*, 77 NJ Eq 219, 79 A 262 (1910); *Thacker Coal Co. v. Burke*, 59 W Va 253, 53 SE 161 (1906). The general rule, however, assumes the contrary. See *Vail-Ballou Press Co. v. Casey*, 125 Misc 680, 212 NYS 113 (1925).

8. See Note, 39 Harv L Rev 108

(1926). But see section 18, *supra*, at note 49.

9. See section 48 *infra*.

10. *Nolan v. Farmington Shoe Mfg Co.*, 25 F(2d) 906 (DCD Mass, 1928).

11. See section 144, *infra*.

12. See section 128, *infra*.

13. See section 128, *infra*.

14. See section 127, *infra*. But see also *infra*, section 127, for a discussion of the extent to which anti-injunction statutes have modified employment of the blanket injunction.

though grounded in an important part in the notion of natural rights, are not always referable thereto. Sometimes the rationale proceeds along the idea that it is better for society to have a free and open market for the employer's business, unhindered by combinations of any kind, including labor combinations. At other times emphasis is laid upon the employee's right to seek employment anywhere, without having that right qualified by labor unions, membership in which (sometimes difficult to obtain) becomes a condition to the securing of employment. Upon this last ground is rested the rule in some states holding a closed shop contract against public policy where the entire industry is governed by the contract¹⁵

Section 25. Constitutional Obstructions to the Ends Sought through Labor Activity.

While constitutional guarantees do not appear, in the first instance, to be immediate liabilities of labor activity, their consequences are as important to the legality of the given labor activity as are any of the traditionally stated sanctions. Thus, for example, in *Adair v. United States*,¹⁶ the United States Supreme Court deprived railroad workers of a valuable aid to unionization when it held unconstitutional a federal statute which made it a misdemeanor for an interstate carrier to threaten with loss of employment or to discriminate against employees because of their membership in a labor organization. Involved in many

15. See sections 97-101, 170, *infra*, for a more detailed statement of the law upon the point and, in connection with strikes, the contending viewpoints upon the subject.

16. 206 US 161, 27 S Ct 638, 52 L Ed 436, 13 Ann Cas 764 (1908). See *Coppage v. Kansas*, 236 US 1, 35 S Ct 240, 59 L Ed 441, LRA1915C, 960 (1915) holding unconstitutional a statute prohibiting employers to require signature of a yellow dog contract as a condition of employment, and see also the following high state court holdings to like effect

with respect to similar state laws: *Gillespie v. People*, 188 Ill 176, 58 NE 1007, 50 Am St Rep 176, 52 LRA 283 (1900); *Brick v. Perry*, 69 Kan 297, 76 P 848, 66 LRA 185, 1 Ann Cas 936 (1904); *State v. Julow*, 129 Mo 163, 108 SW 130, 50 Am St Rep 443, 29 LRA 257 (1905); *People v. Marcus*, 185 NY 257, 77 NE 1073 (1906); *State v. Bateman*, 7 Ohio NP 487 (1900); *State ex rel. Zillmer v. Kreutzberg*, 114 Wis 530, 91 NW 1098, 91 Am St Rep 934, 58 LRA 748 (1902).

[1 Teller]

cases connecting labor activities with constitutional law are illustrations of a sad circumstance in our American constitutional jurisprudence, upon which we shall have further occasion to dwell in this work, that constitutional limitations designed to promote human freedom have sometimes been springboards for judicial holdings destructive of that freedom.

In general, the federal government is constitutionally limited, in connection with the subject of labor activities law, mainly by the rule against undue delegation of powers by one branch of the government to another, the proscription against denial of due process, and by the framework of its enumerated powers, while state governments are forbidden by federal constitutional limitations to enact legislation impairing the obligation of contracts, to take property without due process of law, or to deny to any citizen the equal protection of laws. In addition, of course, state legislatures must contend with state constitutional provisions.

Several cases have clarified the meaning of the limitations upon the federal government contained in the Constitution of the United States. *American Steel Foundries v. Tri-City Central Trades Council*¹⁷ illustrates one of the constitutional limitations with which labor was obliged to contend even after Congress had been induced to enact favorable legislation. There the Clayton Act was held merely declaratory of the common law as it had theretofore been established.¹⁸ That Act had sought to accord to the labor dispute a method of legal treatment different from that governing other relationships. To hold it constitutional and presumably as a gesture of care in behalf of the labor movement, the Supreme Court stultified its provisions in disregard of its history by holding it merely declaratory of the existing common law. Were it otherwise, said the Court, the Clayton Act would have been held unconstitutional as permitting "without due process of

17. 257 US 184, 42 S Ct 72, 66 L. Ed 189, 27 ALR 360 (1921). *Press Co. v. Deering* 254 US 443, 41 S Ct 172, 65 L Ed 349 (1920).

18. To the same effect: *Duplex*

law" the infliction by labor of injury upon capital on the "mere" ground of social justification.¹⁹ *Carter v. Carter Coal Co.*²⁰ is an example of another. There the Guffey Coal Act of 1935, which sought to bring industrial peace to the coal industry, was held unconstitutional because, among other reasons, involving undue delegation of legislative power.²¹ The limitation resulting from the framework of the enumerated powers possessed by Congress under the federal constitution, may likewise be illustrated by the *Carter* case,²² where regulation of labor relations was held to be an improper exercise of Congressional jurisdiction over interstate commerce. The *Carter* case is little authority for the future, to be sure, in the light of the United States Supreme Court decision in the *Jones & Laughlin* case,²³ which upheld the constitutionality of the *National Labor Relations Act* as a valid exercise of the jurisdiction possessed by Congress over interstate commerce,²⁴ but the extent to which Congress may act to regulate labor conditions, as by child labor or minimum wages or maximum hours legislation, is still an uncertain quantum.²⁵

Limitations upon the states contained in the federal constitution have likewise received important judicial interpretations to the detriment of pro-labor legislation. *Truax v. Corrigan*²⁶ is a landmark case in American labor law. The constitutionality of a 1913 Arizona anti-injunction

19. See *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. ed. 254, 27 ALR 375 (1921).

20. 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

21. See *infra*, section 406, for a discussion of the constitutionality of the Fair Labor Standards Act, including mention of the delegation features thereof.

22. 298 U.S. 238, 56 S. Ct. 855, 80 L. Ed. 1160 (1936).

23. *NLRB v. Jones & Laughlin Steel Corporation*, 301 U.S. 1, 57 S. Ct.

615, 81 L. Ed. 563, 108 ALR 352 (1937).

24. See *infra*, sections 245-252, for a general discussion of the constitutionality of the *National Labor Relations Act* in the light of some of the objections which have been offered to its constitutionality.

25. See *infra*, section 406, for a discussion of the constitutionality of the Fair Labor Standards Act of 1938 (*Minimum Wage and Hour Law*).

26. 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 ALR 375 (1921).

law was before the court. The Supreme Court of Arizona had construed the law to prohibit issuance of a labor injunction in restraint of mass picketing though coupled with libelous and abusive language, where the picketing was unconnected with actual violence.²⁷ The United States Supreme Court held the law as thus construed to be unconstitutional. The contentions that the employer had a right to sue at law for damages for any wrong done, and that the police could take care of any unlawful conduct, were brushed aside. The employer's right to a free and open market was entitled, as a substantive right, to its most efficient procedural remedy. Hence a statute purporting to take away the labor injunction as a remedy for unlawful interference with the right to do business was unconstitutional, even though less protective remedies were available.²⁸ Labor's point of view in connection with labor legislation as concerns constitutional law has been to the effect first, that much of the legislation dealing with labor relations, such as anti-injunction statutes, are not innovations but historical correctives, seeking to reinstate for the benefit of labor unions and labor activities the rules and principles elsewhere accorded;²⁹ second, that labor relations law must of necessity be a special type of law because of the sui generis nature of the controversy between capital and labor.³⁰

27. 20 Ariz 7, 176 P 570 (1918)

28. See, for the constitutionality of modern state anti-injunction legislation, *infra*, section 435, and, for a discussion of the manner in which state courts have been construing such legislation in the light of constitutional objections, *infra*, section 436

29. See, for an elaboration of this point of view in connection with modern anti-injunction legislation, *infra*, section 229. See also, for example, a Montana statute (Code 1921, Choate, section 9242[8]) providing that an injunction cannot be granted "in labor disputes under any

other or different circumstances or conditions than if the controversy were of another or different character, or between parties neither or none of whom were laborers or interested in labor questions."

30. Statutes dealing with exemption of labor unions or labor activities from the anti-trust laws are thus contended to be constitutional either upon the ground that labor is not a commodity and hence that the exempting law is no innovation, or upon the ground that labor unions and labor activities require treatment different from that accorded to combinations of capital. See *infra*,

Section 26. Constitutional Protection of Labor Organizations and Labor Activities.

While the constitutional climate of opinion, emanating mainly from judicial interpretations of the due process clause of state and federal constitutions is still, according to many, generally unfriendly to labor, it must be admitted, and mention is here made of the point, that in several circumstances labor has succeeded in obtaining constitutional protection in behalf of asserted rights. Thus, the right to form and join labor organizations has been identified in Massachusetts with the constitutional right of men freely to associate.³¹ So too it is held in many jurisdictions that the arm of equity may not extend to enjoin strikes because of the constitutional prohibitions against involuntary servitude.³² The most outstanding and also the most recent identification of labor's rights with a constitutional guarantee is that of picketing in connection with free speech.³³ But while the National Labor Relations Board has taken the position that the right to strike is a constitutionally protected right,³⁴ the case of *Dorchy v. Kansas*³⁵ seems opposed to such a view, it being there stated that "Neither the common law nor the fourteenth amendment confers the absolute right to strike," and it was there held that a strike called to collect a state claim was unlawful.

sections 189, 195, 455-456.

See also, for a discussion of labor's two barreled point of view in connection with the theory of natural rights, *supra* section 10, in regard to constitutional protection, *infra*, section 26, with respect to the labor injunction, *infra* section 30.

31. *Pickett v. Walsh*, 192 Mass 572, 78 NE 753, 116 Am St Rep 272, 54

6 LRA(NS) 1007, 7 Ann Cas 638 (1906). See also *Alaska S S Co. v. International Longshoremen Assn* 236 F 964 (DC WD Wash 1916).

32. See section 30, *supra*.

33. See sections 135-140, *infra*.

34. See Second Annual Report of NLRB (1937), p 4.

35. 272 US 306, 47 S Ct 86, 71 L Ed 577 (1926).

PART II

LABOR UNIONS, LABOR ACTIVITY AND POSITIVE LEGAL DOCTRINE

CHAPTER FIVE

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Section 27. Many-sidedness of the Wrongful Aspect.

The broad considerations which have been accorded by the common law to the activities of labor have revolved around the conception of "contracts and combinations in restraint of trade," i. e. the right to a free and open market. The idea of "contracts and combinations in restraint of trade" has been the spearhead of substantive American labor law, while the doctrine of conspiracy and the remedy of injunction have been the main legal instrumentalities utilized to delineate common law suspicion of the consequences of labor activity. At common law, a combination in restraint of trade does not seem to have incurred the application of criminal sanctions, bargains in unreasonable restraint of trade being illegal only in the sense that the law refused to lend its machinery in aid of their enforcement. Numerous successive English statutes, however, in conjunction earlier with royal patents of monopoly and still earlier with gild rules and regulations, proscribed combinations and restraints by way of sanctions both civil and criminal. Out of these statutes and as supplemented by common law court holdings, arose the crime and the tort of conspiracy. And the conceptions underlying combination in restraint of trade, as those conceptions had been developed through application of the doctrine of conspiracy, in turn generated both the American labor injunction and antitrust legislation.

But the common law weapons with which labor has been obliged to contend are by no means circumscribed by the notions underlying combinations in restraint of trade, nor by the doctrine of conspiracy and the remedy of injunction. Before proceeding, therefore, with a more elaborate analysis of conspiracy and the injunction, the various other compartments of illegality should be stated. These compartments, together with the crime and tort of conspiracy and the remedy of injunction, make up what is here called

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"the wrongful aspect" of labor activity. A legal right to organize or to engage in a strike, boycott, or picket, or to engage in collective bargaining, may be said to exist only where exercise of these activities does not collide with any of the legal sanctions which together constitute the wrongful aspect of labor activity. Strikers, pickets, boycotters, and union organizers have been fined, imprisoned and otherwise subjected to the categories of legal sanction by way, among others, of trespass, nuisance, barratry, vagrancy, unlawful assembly, extortion, interference with the employment relationship and inducing the breach of contract, breach of peace or disorderly conduct, sabotage and criminal syndicalism, riot or inciting thereto, longer waiting periods as a condition to receiving unemployment insurance benefits, or the complete denial of such benefits. Blanket illegality in connection with all labor activity has also resulted because constituting: obstruction of or interference with the United States mails; interference with the service of a public utility; interference with the channels of interstate commerce; interference with property in the hands of a receiver; interference with the carrying on of war; mutiny or desertion; obstruction to the sale and distribution of commodities vitally necessary to the community. These categories have been the subjects of bitter controversy in books both legal and lay, bound and unbound. Their implications are woven through the cases which make up our modern labor law. The indices to the serried array of periodicals and newspapers supplement the reported law cases with a rich literature concerned with both the specific and the general in relation to these weapons which are held to stand in the way of workingmen's alleged claims. No adequate study of modern labor law can be presented without their inclusion. The law governing labor unions and labor activities in connection with each of these various categories of the "wrongful aspect" of the labor movement will be examined in subsequent sections.³⁶

³⁶ Federal and state antitrust legislation will not be taken up in the subsequent sections of this chap-

ter but will rather be considered in later chapters. This will permit the presentation at chapter twelve, *infra*,

Elaboration will also be made in subsequent chapters and sections of the point which needs to be noted here, that labor's tactics in connection with the many legal sanctions have not been an attack on all fronts but have partaken, rather, of the character of local battles. During many years, for example, labor unions concentrated voices of complaint upon the labor injunction, contending, in part, that it was not the function of the judiciary to intervene in labor disputes but that whatever wrongful conduct was alleged to have been carried on could be and should be handled by the police authorities. Changing rules and principles governing the labor injunction, the process of which change (as reflected, for example, in anti-injunction laws), redounded to the benefit of labor union's activities, found labor now complaining about the stern and unreasonable tactics of police officers in connection with arrests of pickets, strikers or boycotters. Then, when local authorities had been persuaded into a frame of mind favorable to those who carried on labor activities it was asserted that magistrates decided too quickly that pickets could be held for disorderly conduct where disobeying the move-on order of policemen in the face of labor's contentions that the move-on order was the equivalent of an unjust "decree," and was wholly unreasonable and unjustified under the given circumstances. All these tactics to be sure, in many instances went on at the same time but, generally, labor has contented itself with attacking the most important legal sanctions or the most obstructing. This has, in several situations, involved labor unions in embarrassment. Consider, for example, the present Federal law governing labor disputes. Labor could ask for little more than that which the Norris Anti-Injunction Act has given to it by

of the Sherman Act as a foundation point of federal labor law.

The Clayton and Norris Acts, discussions of which will be found in Chapters thirteen and fourteen, *infra*, are not legal sanctions as these words are employed in this work, but rather modifications of prior existing

legal sanctions. To the extent, however, that the Clayton Act gave to private parties the right of injunction to restrain violations of the Sherman Act (see *infra*, section 193) the Clayton Act in effect introduced a new legal sanction.

way of protection against the use of the labor injunction. But while the given strike, picket or boycott may not be enjoined under the Norris Act, it may be nevertheless the subject of criminal prosecution by the United States Government and, likewise, the basis of injunction by the Government, and also the subject of threefold damage suits by aggrieved private parties.³⁷ Labor paid relatively little heed to the asserted evils of the Sherman Act until active governmental prosecution in its behalf made it, to labor's point of view, a menace more serious in some respects than the labor injunction.³⁸

Labor unions probably realize the consequences of their tactics in connection with existing legal sanctions, but the character of past activities may nevertheless be expected to continue without any substantial change. Labor's pragmatic viewpoint may be explained in part as being the reflection of lack of funds to combat the many legal sanctions. Thus, the emergence of picketing as a substitute for the strike and the boycott was partly the result of the much smaller financial expenditure entailed in carrying on labor activity. There is a second reason, which is possibly a more important one. Labor unions believe that progress in connection with a given legal sanction will likewise bring other legal sanctions in line. In this they have often been disappointed, but as a generality the point is of undoubted significance.³⁹ A third reason is probably found in the general disinclination of human beings to concern themselves with any but current matters. The given legal sanction is consequently made the subject of protest only when actively utilized against labor. All this, of course, is a good example of the relativity of right and wrong in law.

Section 28. Criminal Conspiracy.

The early strike cases concern themselves almost solely with the crime of conspiracy.⁴⁰ Through yielding in modern

37. See *infra*, sections 420-422

38. See *infra*, sections 180, 420-

422.

39. See, for example, *infra*, section

456

40. See "A Documentary History

significance to the labor injunction, the crime of conspiracy continues to remain an important legal obstacle to the assertion of workers' alleged rights. The grounds upon which labor activities are subjected to the sanction of conspiracy have heretofore been considered.⁴¹

Francis B. Sayre, in a scholarly article,⁴² has traced the common law crime of conspiracy from its early purposes in the fourteenth century to condemn as criminal, combinations solely to procure false indictments or to bring false appeals or to maintain vexatious suits. His study indicates the truth of the saying that origins are often lost in antiquity. Sayre indicates that an unfortunate statement by an eighteenth century authority on criminal law⁴³ drove away the conception from its original intentment into a vague epigram which defined a conspiracy in terms of any combination "either to do an unlawful act, or a lawful act by unlawful means." Stated more fully, Sayre's historical analysis demonstrates (1) that the common law originally possessed no independent crime of conspiracy; (2) that the first statute in 1330 resulted in the rule that "combinations only to procure false indictments or to bring false appeals or to maintain vexatious suits could constitute conspiracies;" (3) that the idea "that a combination may be criminal, although its object would not be strictly criminal apart from the combination," was squarely repudiated by Lord Holt in 1704, and (4) that the subsequent development of the crime to include agreements to perform an act not punishable as a crime is attributable to reliance upon an erroneous and unfounded dictum by Hawkins, published in his "Pleas of the Crown" in 1716: "There can be no doubt but that all confederacies, whatsoever wrongfully to prejudice a third person, are highly criminal at common law." In 1783, Lord Mansfield could state the culminated doctrine of conspiracy in *Rex v. Eccles*⁴⁴ as follows:

of *American Industrial Society*," L. Rev 393 (1922).

Vols. III and IV.

41. See *supra*, sections 11-23, especially sections 15-22

42. *Criminal Conspiracy*, 35 *Harv*

43. Hawkins, *Pleas of the Crown* (1721).

44. 1 Leach CL 274, 168 Eng Rep 240. Other English cases applying

"Every man may work at any price he pleases, but a combination not to work under certain prices is an indictable offense." When the first American case involving a trade union combination for the purpose of obtaining an advance in wages was presented to an American court,⁴⁵ the defendant workers were convicted through invocation of this astounding bit of elastic common law doctrine—criminal conspiracy. The contention advanced in behalf of the defendants, that criminal conspiracy cannot legally be consummated in the absence of the employment of criminal means or the seeking of criminal ends was overruled. The court based its decision upon the oppression to the employer involved in the combination. The possibility of like oppression to the workers involved was ignored.

Sayre's analysis has not gone unchallenged. And since the opposing contentions upon the subject serve to clarify the historical background of American labor problems, they will be stated here. There can be no doubt that English statutory labor law beginning in 1349 with the Emergency Ordinance of Laborers and the confirmatory Statute of Laborers in 1351, and culminating with the Combination Law of 1800, displayed definite hostility to the attempts by workers to better their terms or conditions of employment. The earliest statutes were aimed at the individual worker,

the crime of conspiracy to workers' combinations are chronologically as follows: *Tubwomen of London* (cited in *Rex v. Journeymen Tailors*, infra). *Rex v. Journeymen Tailors*, (1721) 8 Mod 10, 88 Eng Rep 9, *Rex v. Mawby* [1796] 6 TR 619, 101 Eng Rep 736, *Hilton v. Eckersley* [1825] 6 El & Bl 47, 119 Eng Rep 781

45. 3 Commons and Gilmore, *A Documentary History of American Industrial Society*, 59-245. The case, decided in 1809, is known as that of the "Philadelphia Cordwainers." Other early American labor cases where in the doctrine of conspiracy was utilized to strike down labor activity

are *People v. Melvin* (NY 1810) 2 Wheeler Crim Cas 262 *People v. Trequier* (NY 1823) 1 Wheeler Crim Cas 142, *People v. Fisher* (NY 1835) 14 Wend 9. See also *Cote v. Murphy*, 159 Pa St 20, 28 A 190 (1894). The outstanding early American case repudiating the blanket application of the doctrine of conspiracy to workers' combinations connected with wages, hours and other conditions of employment is the Massachusetts decision of *Commonwealth v. Hunt*, 4 Mete 111, 38 Am Dec 346 (1842). The subsequent judicial labor history of Massachusetts, however, has belied the prospects induced by a reading of the Hunt case.

whose services had been placed at a premium by the ravages of the Black Death.⁴⁶ The Combination Law of 1800 was a blanket suppression of workmen in combination, strikes and trade unions. Dean Landis takes issue with those who entertain the viewpoint that the Combination Law of 1800 was "the introduction of a new policy rather than, like most legislation, authentic confirmation of existing legal conceptions."⁴⁷ "It would be odd indeed," says Dean Landis, "for a civilization which sought by law to repress individual bargaining by the laborer to permit him freely to engage in collective bargaining. It would be more than odd for a court to punish a laborer for terminating his relationship with his master, and to punish him for demanding more than the customary wages, and at the same time refuse to treat as criminal a combination of laborers seeking to use their combined bargaining power to bring about an increase in wage rates."⁴⁸ It is submitted that the Landis view is not necessarily irreconcilable with that taken by Sayre. The Landis view may be restated as contending that liability to prosecution or damages for conspiracy rests not only upon common law but also upon successive English statutes passed to control English labor. Dean Landis criticizes Sayre's analysis as based upon a narrow conception of the common law which excludes policies expressed in statutes.⁴⁹ Stephen's view, that such statutes were reflective of peculiar English conditions and hence outside the

46. Robo, in *The Black Death in the Hundred of Farnham*, 44 *Hist Rev* 560 (1929) advances the contention that the Black Death was merely the excuse for antiworker legislation deemed desirable by the then business interests. The many later statutes (See Landis, *Cases on Labor Law* [1934] p. 3 note 16) confirming and reiterating the Statute of Laborers would seem to argue in favor of Robo's contention.

47. Landis, *Cases on Labor Law* (1934), p. 4. The viewpoint assailed has been advanced by Wright (*Law* 62

of Criminal Conspiracies, [1837]), Webb (*History of Trade Unionism*, c 2, [1920]) and Sayre (*Criminal Conspiracy*, 35 *Harv L Rev* 393, [1922]).

48. Landis, *Cases on Labor Law* (1934), pp. 3-4. In accord with the Landis view are George ("The Combination Laws Reconsidered," 1 *Econ Hist* 214 [1927]) and no less an authority than Holdsworth (2 *Hist of English Law* 470).

49. Landis, *Cases on Labor Law* (1934), p. 4.

pale of American reception laws, would therefore seem to be in point.⁵⁰ More dispositive of the argument is the fact that American labor cases invoking the doctrine of criminal conspiracy relied not upon English statute law, but upon principles settled by judicial decisions and by text-writers purporting to interpret such decisions. Whatever may have been the statutory unfolding of English labor law, the emergence of the judicial doctrine of criminal conspiracy and the transplanting of that doctrine to American courts involved, as Sayre has so illuminatingly demonstrated, a baseless judicial extension.

A further source of confusion, if clarified, will indicate the wisdom of Sayre's historical observations. It seems customary for text-writers upon the subject of labor law to commence the historical background of the subject with the Ordinance of Laborers of 1349 which was reenacted as the Statute of Laborers in 1351, motivated by the fact that the Black Death had created such a scarcity among available workers as to have engendered the fear that they would demand exorbitant wages for their services.⁵¹ The enactments of subsequent statutes to like effect are then set forth in carrying the history forward to present times. Dean Landis also adopts such a method of analyzing the history of labor law.⁵² It is submitted that no more inappropriate commencement fraught with greater confusion could be made. The tragedy of a plague and not any

50. 3 History of the Criminal Law of England, 209-228. "It seems not out of place to suggest that the decisions of the English courts upon questions affecting the rights of workmen ought, at least, to be received with caution, in view of the fact that the later ones are largely supported by early precedents, which were entirely consistent with the policy of the statute law of England but are hostile not only to the statute law of this country, but to the spirit of our institutions." *National Protective Ass'n v. Cumming*, 170 NY 315, 332, 73 NE

367, 58 LRA 135, 38 Am St Rep 648 (1902). See also *Commonwealth v. Hunt*, 4 Mete 111, 38 Am Dec 346 (Mass 1842).

51. See Martin, *Modern Law of Labor Unions* (1910), Hedges and Winterbottom, *Legal History of Trade Unionism* (1930), Lieberman, *The Collective Labor Agreement* (NY 1940) pp 3-5. "The study of labor law traditionally begins with the period of the black death." Rotwein, *Labor Law* (1939), p. 6; Rest, *Torts* (1939) c 38 (Introductory note).

52. Landis, *Cases on Labor Law* (1934), p. 2.

philosophy about the economic order prompted enactment of the Statute of Laborers. Then the mercantile system emerged in England to hold sway over the minds of men from the conclusion of the middle ages to the advent of the industrial revolution. These were years when governmental regulation of business enterprise was the accepted order. Statutes of Laborers reenacted from time to time during this period were not the reflection of hostility toward labor combinations as such but were rather the execution of a paternalistic philosophy of government. Thus combinations of workers formed to enforce the rate of wages fixed by statute were permitted and even encouraged.⁵³ Thereafter paternalism went out of the heart of the State with the advent of the industrial revolution. Nevertheless the Statutes of Laborers remained on the books, though the reason for their enactment had ceased to exist. The rise of unionism was not occasioned by the Statutes of Laborers nor by the manner in which the government had interpreted the notion of paternalism. On the contrary, the trade union was "the workers' substitute for the human, paternalistic state that had become transformed by the philosophy of competition into a remote, inhuman monster,"⁵⁴ to quote the language of a leading English authority. Any attempt, therefore, to view the common law's aversion to labor combination as a well ordered statutory unfolding through the years must stand criticism as an erroneous effort to stamp the crime of conspiracy with the approval of circumstances which do not, in fact, bear out the supporting contentions.⁵⁵

53. Sidney and Beatrice Webb, *History of Trade Unionism* (1920 Edition) pp 65-67.

54. Milne Bailey, *Trade Unions and the State* (1934), p. 92.

55. That the Statutes of Laborers have nevertheless had a lasting, if wholly unjustified, effect upon American labor law cannot be denied. Thus, for example, statutes in several states prohibit enticement of employees although the employment

is at-will. See Section 45, *infra*. In one respect, however, American constitutional law failed or refused until recently to follow the logic of the English Statutes. The Statutes of Laborers, aside from their provisions prohibiting enticement of laborers, established the principle of the maximum wage, because of the plentifulness of jobs, the scarcity of laborers and presumably the danger of the exaction of exorbitant

Having now analyzed some points of legal history for the purpose of indicating the framework within which the doctrine of conspiracy has developed, it remains to conclude that Sayre's historical survey, though excellent, is not precisely to the point. It matters not, that is to say, whether or not the cases relied upon by modern judicial decisions to support propositions about criminal conspiracy support the conclusions for which the cases are cited. For the industrial revolution, with its consequential breach in the social and economic life of the people, created new interests which called for legal protection. Trained in *stare decisis*, judges cited early cases to give to the law an aspect of continuity. That the early cases thus cited prove to be irrelevant to the issue does not disprove the wisdom of 19th century judges. The right to a free and open market, which has heretofore been stated and whose meaning has heretofore been examined⁵⁶ was the thing which was being protected, even though the judges, largely under the influence of historical jurisprudence, clothed the new right with a variety of terminology.⁵⁷

The finished doctrine of criminal conspiracy which organized labor met at the hands of the common law may, in conclusion, be said to be based upon three notions, the first of which, coupled with the second or third, was sufficient to stamp a confederation as a criminal conspiracy. First, that combination is sufficient to render criminal an act which is not criminal if done by any mem-

wages. The opposite set of circumstances, i. e. scarcity of jobs, plentyfulness of laborers and socially undesirable low wage payments, gave rise to minimum wage legislation. At first such legislation though limited to women, or women and children, was held unconstitutional. *Adkins v. Children's Hospital*, 261 U.S. 525, 43 S. Ct. 394, 67 L. Ed. 525 (1923), *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 56 S. Ct. 918, 80 L. Ed. 1347, 103 ALR 1445 (1936). But these decisions were

overruled by the case of *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S. Ct. 578, 81 L. Ed. 703, 108 ALR 1330 (1937) where a Washington Statute providing for the establishing of minimum wages for women was upheld.

⁵⁶ See Sections 11 to 13 *supra*, and Section 23.

⁵⁷ See Sections 14 to 22 *supra*, for a discussion of the various theories offered to explain the illegality of combined activities.

ber of the combination singly. Second, that the mere fact of oppression or injury as the result of the combination is sufficient to constitute the combination a criminal conspiracy, even though the oppression or injury is neither crime nor tort.⁵⁸ Involved in this notion was the proposition that the problem is one solely for the court to determine, and without any guideposts, whether the end sought is oppressive or injurious. Third, that "unlawful" means employed by the combination are sufficient to stamp the confederation a criminal conspiracy, even though the unlawfulness is neither criminal nor tortious in nature. "Concert of action," said the highest court of our land, "is a conspiracy if its object is unlawful or if the means used are unlawful."⁵⁹ Here, then, was legal doctrine which encouraged the unpredictable. It concealed the impulses which guided the administration of the law, and because it prompted a jurisprudential method which found its source in the breast of the individual judge, it bred inequality in the administration of justice.⁶⁰

Section 29. Civil Conspiracy.

Civil conspiracy as distinguished from criminal conspir-

58. "The general principle on which the crime of conspiracy is founded is this, that the confederacy of several persons to effect any injurious object creates such a new and additional power to cause injury as requires criminal restraint although none would be necessary were the same thing proposed or even attempted to be done, by any person" Bishop, Criminal Law, 180.

59. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 ALR 375 (1921), citing *Pettibone v. United States*, 148 U.S. 197, 203, 13 S. Ct. 542, 37 L. Ed. 419 (1892).

60. "The indefiniteness of the law of conspiracy to injure prevents it from being a practical guide to workmen as to what they may do in times of strike and what they must

avoid . . . it is no exaggeration to say that a lawyer is unable to advise a trade union with any confidence on elementary points connected with a strike and with public order, as, for instance, whether it is actionable for a committee of two or more workmen acting together to organize a strike against nonunionists at all. For these reasons . . . the law of conspiracy to injure is a law unfitted for workmen in case of trade disputes." Report of Royal Commission on Trade Disputes of 1906, Cd. 2825, p. 89 (1906). See also Bishop on Non-Contract Law, section 362: "The term 'conspiracy' is in our books oftener misapplied than correctly used."

acy has played a lesser role in American labor law. Actions to recover threefold damages under the Sherman Act, however, indicate the continued significance of the notions underlying civil conspiracy. Generally, the same rules and uncertainty of outline which characterize the common law doctrine of criminal conspiracy govern as well the law of civil conspiracy. The substantive right which the courts conceive as impaired by labor combinations, when they confederated to attain a given object, is the right to a free and open market. A fundamental distinction between the two, however, lies in the fact that civil conspiracy, being an aspect of the law of civil wrongs, for which damages are recovered by reference to the theory of compensation, requires an overt act culminating in damage. "An action will not lie for the greatest conspiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie."⁶¹ The requirement of an overt act is lacking in criminal conspiracy, it being the confederation and not the damage which is the basis for legal liability. Conspiracy, to be criminal, need not be attained. A single step in that direction is said to be sufficient.⁶²

61. *Savile v. Roberts*, 1 *Lt Rym* 378. See also *Boutwell v. Marr*, 71 *Vt* 2, 42 *A* 607 (1890). In *Loewenthal v. Beth David Hospital* (NYLJ Nov 17th, 1938) the matter was well put as follows: "The gravamen of the civil action of conspiracy is the acts of the defendants and the consequent damage, and not the conspiracy itself. The only purpose of alleging the conspiracy is to connect all the defendants with the transaction and to charge them all with the acts and declarations of their co-conspirators."

62. *State v. Lustberg*, 1 *NJ Misc* 61, 164 *A* 703 (1933). It should be noted, however, that while the requirement of an overt act was lacking at common law in so far as criminal, (as distinguished from civil)

conspiracy is concerned, statutes generally require such an overt act. Some of the statutes apply to all criminal conspiracies, while others are restricted to such criminal conspiracies as constitute felonies, leaving the common law rule unimpaired as to misdemeanors. This is not to say that such statutes have destroyed the distinction between civil and criminal conspiracy in this respect, for the overt act required as a precondition to actionable civil conspiracy must be such as to culminate in damages to the aggrieved party.

An indictment under the Sherman Anti Trust Act is sufficient though no overt act is therein set forth. The mere agreement or confederating is sufficient. *Knauer v. United*

Still another important distinction between civil and criminal conspiracy seems to have been developed in the law books. "In our civil as distinguished from our criminal law, there is no such thing as liability for conspiracy to harm unless the harm, considered apart from conspiracy, is a legal injury."⁶³ The reason for the distinction is difficult to understand. Cases applying the distinction to civil conspiracy situations are many in number.⁶⁴ It has even been said in an English case that civil conspiracy, to be actionable, must likewise constitute a criminal conspiracy.⁶⁵

It is the general rule that one who becomes party to a conspiracy under coercion or to avoid loss to himself is none the less liable as a co-conspirator.⁶⁶

Section 30. The Labor Injunction.

In the latter part of the 19th century,⁶⁷ American courts suddenly discovered that they possessed jurisdiction to enjoin strikes and other practices of labor organizations, upon the general theory that the employer would otherwise

States, 237 F 8 (CCA 8, 1916); United States v. Norris, 255 F 423 (DCND III ED 1918)

63. Lewis, Trade and Labor Disputes (1905), 53 Am Law Reg 465

64. Randall v Hazelton, 94 Mass 412 (1866), Bowen v. Matheson, 96 Mass 499 (1867); Van Horn v Van Horn, 52 NJL 284 (1890), Moore v Bricklayers Union, 23 Ohio LB 48, 10 Ohio Dec Rep 665 (1890). Delz v Winfree, 80 Tex 400, 16 SW 111, 26 Am St Rep 755 (1891), Bohn Mfg. Co v Hollis, 54 Minn 223, 55 NW 1119, 21 LRA 337, 40 Am St Rep 319 (1893); Graham v St. Charles St Ry Co., 47 La Ann 214 (1895). C/f Mapstrik v. Range, 9 Neb 390 (1878).

65. Sorrell v Smith, [1925] AC 709, 13 BRC 1.

66. Central Metal Products Corporation v. O'Brien, 278 F 827 (DC 68

ND Ohio 1922), Buyer v Gullan, 271 F 65 (CCA 2, 1921), Abertshaw Construction Co v Cameron 194 Mass 209, 80 NE 478 120 Am St Rep 542 (1907), Lehigh Structural Steel Co v Atlantic Smelting & Refining Co 92 NJ Eq 131, 111 A 376 (1920)

67. In re Debs, 158 US 564, 15 S Ct 900, 39 L Ed 1093 (1894) Earliest state court cases are Davis v Zimmerman, 91 Hun 489, 36 NYS 303 (1895), Sherry v Perkins, 147 Mass 212, 17 NE 307, 9 Am St Rep 689 (1888), Barr v Essex Trades Council, 53 NJ Eq 101, 30 A 881 (1894); McCandless v. O'Brien, 2 Pittsb Leg J (NS) 435, Railroad Co. v. Wenger, 17 Wkly Law Bull 306, 24 Abb NC 267; Murdock v. Walker, 152 Pa St 595, 25 A 492, c/f Trial of Boot & Shoe Makers of Philadelphia (1806). See also Commons, History of Labor in the United States, p. 504.

be the victim of irreparable injury without adequate remedy at law. The famous Debs case relegated the crime of conspiracy to the position of a secondary legal sanction, and made courts of equity the arbiters of American labor disputes. The labor injunction swiftly became a cause for national concern. Though professedly a mere procedural device of the common law through force of which only the substantive law governing labor activity was presumably enforced, labor has contended that the labor injunction was and still is so applied and extended as to constitute its exercise a distinct legal liability. The assertedly reckless issuance and enforcement of the labor injunction have found repercussion, according to many observers, in industrial violence and reflection in drastic legislative restrictions. Neither consequence reflects well upon the wisdom of the American judiciary.

That courts have since early times possessed jurisdiction to issue injunctions to prevent continuous or repeated trespasses (as where labor organizers enter the employer's property)⁶⁸ or to command non-interference with contractual relations (as where an employer has entered into term contracts with his employees)⁶⁹ or to require observance of a contract entered into by a striking labor union with the allegedly aggrieved employer struck against by enjoining the strike in derogation of the contract⁷⁰—all this cannot easily be gainsaid except by a reference to theories about social interests. The assumption of jurisdiction, however, which has occasioned so much dispute among legal scholars, relates to the assertion by courts of equity of a specific power to enjoin strikes, pickets and boycotts, without more, by virtue of a general theory of jurisdiction which conceived a business, like land, as a sort of property susceptible of equitable intervention, through issuance of drastic injunctions in disregard of many otherwise conceded limitations upon equity's historical policy. English courts never discovered such a jurisdiction. The labor injunction

68. See *infra*, section 32.

70. See *infra*, section 86.

69. See *infra*, sections 45-48.

has often been likened to an enactment, in effect, of a penal code by a judge who thereupon proceeds to determine the defendant's guilt, and to punish him for the crime under the guise of contempt proceedings. Chief Justice Taft stated in *Ex Parte Grossman*⁷¹ that "contempt proceedings are sui generis because they are not hedged about with all the safeguards provided in the bill of rights for protecting one accused of ordinary crime from the danger of unjust conviction," yet the labor injunction and its corollaries, ex parte orders, holdings upon affidavits without hearing in open court with opportunity for cross examination, and contempt proceedings, were developed by the American judiciary to become the catch-all, according to labor, of judicial anti-labor sentiment.

Voices in protest were here and there to be heard.⁷² In *Manker v. Bakers Union*,⁷³ the court denied an application for a preliminary injunction restraining peaceful picketing, and replied to the complainant's query as to what would happen if the picketing were to become violent, as follows: "If such a course were resorted to, the defendant would be afforded an opportunity of meeting his accuser and bringing the witness before the court, who, after seeing them, could readily determine their credibility and then definitely determine whether or not the law had been violated. It would seem that this was the procedure which the founders of our government intended, and it is the one more likely to result in a just decision than the more popular modern remedy of a temporary injunction, where the court is called upon to determine controverted questions on affidavits without the advantage of seeing the witnesses who make them." Judges who decided facts contained in conflicting affidavits, most if not all of which were prepared by advice of counsel, thereby naturally subjected them-

71. 267 US 87, 117, 45 S Ct 332, 69 L Ed 527 (1925).

72. See Dunbar, *Government By Injunction* (1897) 13 LQ Rev 347; Gregory, *Government By Injunction* (1898) 11 Harv L Rev 487, Stimson, *The Modern Use of Injunctions*

(1895) 10 Pol Sci Q 189, Allen, *Injunction and Organized Labor* (1894) 28 Am L Rev 828 See also Rest., *Torts* (1939) Secs. 813-816.

73. 220 Misc 516, 221 NYS 106 (1927).

selves to the criticism of having carried prejudice into judicial chambers.

The strike, says labor, must be viewed as a major campaign waged by labor after unsuccessful attempts at negotiation have convinced workingmen of the necessity for a show of strength. So too of the picket and the boycott. Into this scene, equity has intervened, continues labor, to demolish the quest of organized labor to exert its action as a counterpoise to the power of capital, by issuing a "temporary" injunction, which, though purporting merely to stay proceedings pending a final hearing, usually terminates the energies of jobless workers.⁷⁴ It has been recognized judicially that "the moral effect of an injunction order in such cases is tremendous. At once it gives the impression in the community that the strikers have violated the law. The court seems to have taken a hand in the struggle. This is the layman's view. The injunction, thus shaping public opinion, is often decisive."⁷⁵ William Green, testifying before Congress in 1928, remarked thus: "I wish I could submit to you the figures showing the large sums of money which we have been required to raise and pay in order to meet the court costs and the attorneys' fees. Now that means that even if we win, we lose."⁷⁶ It is no

74 See Witte, *The Government in Labor Disputes* (1932), pp. 335-344 for lists of 117 *ex parte* temporary restraining orders dissolved or modified after a hearing, and 63 cases wherein labor injunctions were dissolved or modified upon the defendants' appeal, as compared with 36 cases during a similar period wherein complainants appealed successfully.

It is well settled that, in the absence of statute, equity can grant both a temporary restraining order and an interlocutory (sometimes also called "temporary" or "preliminary") injunction without notice to the adverse party, and before the service of any process. *Franz v. Franz*, 15 F(2d) 797 (CCA Mo,

1926). A temporary restraining order is distinguished from an interlocutory, temporary or preliminary injunction in that it is ordinarily granted merely pending the hearing of a motion for a temporary injunction and its operation ceases with the disposition of that motion without further order of the court. *Pack v. Carter*, 223 F 638 (CCA 9, 1911), while a temporary injunction is granted either until the coming in of the answer or until the final hearing of the case, and stands as a binding restraint until rescinded by the further action of the court. *Pack v. Carter*, 223 F 638 (CCA 9, 1915).

75. *Walter v. Toohy*, 114 Misc 185, 186 NYS 95 (1921)

76. Hearings before subcommittee

wonder that the American Federation of Labor officially characterized the labor injunction as a "snare and a delusion" and that respect for the equal administration of law has thereby been impaired in many circles. Consideration of the several focal points of contention surrounding the labor injunction will serve to clarify the issues involved.

A cardinal maxim of equity declares that in enjoining the commission of an act, equity intends not to punish the perpetrator (for that would constitute an encroachment upon the criminal law) but merely to protect the rights of the party seeking relief.⁷⁷ Yet in labor cases, courts have uniformly held that violent, noisy or otherwise excessive picketing will support a decree enjoining not only the excessiveness but all picketing as well.⁷⁸

Another guiding precept to which equity courts have constantly paid homage is that equity will not restrain the exercise of personal as distinguished from property rights no matter how injurious to the plaintiff.⁷⁹ This obstacle was hurdled by holding a business to be a property right

of the Senate Committee on the Judiciary, S 1482, 70th Cong 1st Session.

77 *People ex rel Bennett v Lammon*, 277 NY 368, 14 NE(2d) 439 (1938). *De Agostina v Holmden*, 157 Misc 819, 285 NYS 900 (1935).

78 *Riggs v Tucker*, 196 Ark 571, 119 SW(2d) 507 (1938). *Nann v Raimist*, 255 NY 307, 174 NE 690, 73 ALR 669 (1931). In New York the rule at present seems to be that while evidence of violence will support a blanket injunction against picketing in any manner if there is a further finding by the trial court that peaceful picketing in the future is impossible, only a modified injunction restraining excessiveness will be granted where the excess comprehends mere noise or shouting. *Bailis v. Fuchs*, 283 NY 133, — NE (2d) — (1940). *Wise Shoe Co v. Lowenthal*, 266 NY 204, 194 NE 749

(1935). *Busch Jewelry Co v United Retail Employees Union*, 281 NY 150, 22 NE(2d) 320, 124 ALR 744 (1939). *Mays Furs, Inc v Bauer* 282 NY 331, 26 NE(2d) 279 (1940). See, for a fuller discussion of the matter, *infra*, section 127.

79. *Baumann v Baumann*, 250 NY 382, 165 NE 819 (1920). *Seelman on Libel and Slander*, Para 97, *Clere v Edwards*, 166 Misc 26, 1 NYS (2d) 244 (1937). Employees have been refused equitable relief against denial of seniority rights in breach of collective bargaining agreements because seniority rights are asserted to be "personal" as distinguished from "property" rights. (*Chambers v Davis* 128 Miss 613, 91 S 346, 22 ALR 114 (1922); *Louisville, etc. R. Co. v. Bryant*, 263 Ky 578, 92 SW(2d) 749 (1936). But the great weight of authority holds to the contrary. See section 169, *infra*.

(like land) and not a personal right (like a course of conduct).⁸⁰ Legal scholars have not altogether been in agreement with such a viewpoint. Mr. Justice Holmes has had this to say about it:⁸¹ "Delusive exactness is the source of fallacy throughout the law. By calling a business 'property' you make it seem like land, and lead up to the conclusion that a statute cannot cut down the advantages of ownership existing before the statute was passed. An established business no doubt may have pecuniary value and commonly is protected by law against various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct."⁸² A 1914 Massachusetts statute which defined property so as to withdraw from business the right to injunctive relief was nevertheless declared unconstitutional by the Massachusetts high court.⁸³

A third equitable notion usually asserted as governing especially temporary injunctions is that a balance of convenience is necessary before the drastic remedy will be issued. Inquiry is presumably made whether greater injury will result from denial of the remedy than from its grant.⁸⁴ Labor insists that rarely does consideration of this notion appear in cases involving the labor injunction.

⁸⁰ *Dorchy v Kansas*, 272 US 306, 311, 47 S Ct 86, 87, 71 L Ed 248 (1926). "In its primitive stages, the injunction was chancery's device for avoiding the threat or continuance of an irreparable injury to land. As time went on, it was found serviceable for other, newly acquired concerns of a growingly heterogeneous society. But legal tradition fosters the illusion that law always was what it has come to be. And so, the chancellor brought under the concept of property whatever interests he protected." Frankfurter and Greene, *The Labor Injunction* (1930) p. 47. c/f *Frey*, *The Labor Injunction*, pp 33-34, where the author answers the question as to whether business is property as follows

"Business is not property' Business is the activity, energy and method by which men dispose of property for profit. Business is a personal right"

⁸¹ Dissenting in *Truax v. Corrigan*, 257 US 312, 42 S Ct 124, 66 L Ed 254, 27 ALR 375 (1921).

⁸² See also *Lindsay and Co v. Montana Federation of Labor*, 37 Mont 264, 96 P 127, 18 LRA(NS) 707, 127 Am St Rep 722 (1908)

⁸³ *Bogn v Perotti*, 224 Mass 152, 112 NE 853, LRA1916F 831 (1916).

⁸⁴ *Barnard v. Gibson*, 7 How 650, 12 L Ed 857 (1849). *Van Horn v. Des Moines*, 192 Ia 1313, 186 NW 193 (1922). See 32 CJ 80 and cases there cited

A fourth conception governing equity jurisdiction is that the arm of equity may not be utilized to enforce the criminal law.⁸⁵ Clarity in the meaning of this conception is impaired by the rule, which is as equally well settled as the main conception, that equity's jurisdiction to deal with irreparable injuries is not nullified simply by reason of the fact that the injuries are likewise infractions of the criminal law.⁸⁶ In a number of labor injunction cases, the man-

85. In re Debs, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895); Bessemer v Bessemer City Water Works 152 Ala 391, 44 S 663 (1907); U. S Express Co. v State, 99 Ark 633, 139 SW 637 (1911), Pierce v Stablemen's Union, 156 Cal 70, 103 Pac 324 (1909), State v. Tolbert, 56 P(2d) 45 (Colo, 1936), Heber v. Portland Gold Mining Co 64 Colo 352, 172 P 12 (1918); Wolcott v Doremus, 101 A 868 (Delaware 1917), Haggerty v Coleman, 182 So 776 (Fla, 1938), O'Brien v Harris, 105 Ga 732, 31 SE 745 (1898), People ex rel Kerner v Hals, 355 Ill 412, 189 NE 346 (1934); People v. Universal Chiropractors Assoc 302 Ill 228, 134 NE 4 (1922), Chicago, Etc R Co v Indiana Natural Gas Co 161 Ind 445, 68 NE 1008 (1903); Moir v Moir, 181 Iowa 1005, 165 NW 221 (1917); Levy v Kansas City, 74 Kan 861, 86 P 149 (1906) Monticello v. Bates, 163 Ky 38, 173 SW 159 (1915), Houlton v Titecomb, 102 Me 272, 66 A 733 (1906), Shuman v. Gilbert, 209 Mass 225, 118 NE 254 (1918), United Detroit Theatres Corp v Colonial Theatrical Enterprise, 280 Mich 425, 273 NW 756 (1937); St. John v. McFarlan, 33 Mich 72 (1875); Higgins v. LaCrov, 110 Minn 145, 137 NW 417 (1912); Laymaster v. Goodwin, 260 Mo 613, 168 SW 754 (1914), State v Maltby, 188 NW 175 (Nebraska, 1922); Manchester v Smith (NH) 10 A 700 (1887); Central R. Co. of New Jer-

sey v. Simandi, 125 NJ Eq 91, 4 A (2d) 281 (1939), aff'g 124 NJ Eq 207, 1 A (2d) 312 (1938); Green v Piper, 80 NJ Eq 288, 84 A 194 (1912), Wolfenstein v. Fashion Originators Guild of America, 244 AD 656, 280 NYS 361 (1935), Delaney v Flood, 183 NY 323, 76 NE 209 (1906); Mathews v Lawrence, 193 SE 730 (NC 1937); Carolina Motor Service v Atlantic Coast Line R Co 210 NC 36, 185 SE 479 (1936), Harggett v Bell, 134 NC 394, 46 SE 749 (1904); State v. Capital City Dany Co 24 Okla 252, 123 P 1021 (1912), Park Theatre Corp. v Mook, 87 PLJ 101 (1939), Com v Smith, 266 Pa 511, 109 A 786 (1920), State v Conragen, 171 A 326 (RI, 1934), Kelly v. Conner, 122 Tenn 339, 123 SW 622 (1909), Crowder v Grahame 201 SW 1053 (Texas 1918), Mears v. Colonial Beach, 184 SE 175 (Va, 1936), Meredith v Triple Island Gunning Club, 113 Va 80, 73 SE 1020 (1912), Seattle Taxicab Co v. Seattle, 86 Wash 594, 150 P 1134 (1915); State v Ehrlich, 65 W Va 700, 61 SE 935 (1909), Tiede v. Schmeidt, 99 Wis 201, 74 NW 798 (1898).

86. In re Debs, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895); Reed v. Lehman, 91 F(2d) 919 (CCA, 2 1937); Try-Me Bottling Co. v. State, 178 S 231 (Ala, 1938); Blount v. Sixteenth St. Baptist Church, 206 Ala 423, 90 S 602 (1921); Funk Jewelry Co. v. State, 46 Ariz 348, 50

date of equity has issued to enjoin acts of alleged violence and intimidation in disregard of labor's argument that wrong, if there be any, ought to be dealt with by those entrusted with enforcement of the criminal law.⁸⁷ A 1913

P(2d) 945 (1935); *State ex rel. La Prade v. Smith*, 43 Ariz 131, 29 P (2d) 718 (1934), mod 31 P(2d) 102 (1934); *Takiguchi v. State*, 55 P (2d) 802 (Ariz. 1936), *Herald v. Glendale Lodge No. 1289*, 46 Cal App 325, 189 P 329 (1920), *Rogers v. Nevada Canal Co.*, 60 Colo 59 151 P 923, Ann Cas 1917C 669 (1915), *State v. Maury*, 2 Del Ch 141 (1851), *Dean v. State*, 151 Ga 171, 106 SE 792 (1921); *Central Cotton Garment Mfrs Ass'n v. I L G W U* 280 Ill App 168 (1935), *Barrett v. Mount Greenwood Cemetery Ass'n*, 159 Ill 385, 42 NE 891, 50 Am St Rep 168, 31 LRA 109 (1896), *Columbian Athletic Club v. State*, 143 Ind 98 40 NE 914 52 Am St Rep 407, 28 LRA 727 (1895), *Wabash R Co v. Peterson* 187 Iowa 1331, 175 NW 523 (1919), *State v. Howat*, 109 Kan 376 198 P 686 (1921), *Monticello v. Bates*, 163 Ky 38, 173 SW 159 (1915), *Skowhegan v. Heselden*, 117 Me 17, 103 A 772 (1917), *Ovorne v. Castelberg Jewelry Corp* 170 Md 661, 185 Atl 562 (1936), *Hamilton v. Whitridge*, 11 Md 128, 69 Am Dec 184 (1857); *Vegelahn v. Gunter*, 167 Mass 92, 44 NE 1077, 57 Am St Rep 443, 35 LRA 722 (1896), *United Detroit Theatres Corporation v. Colonial Theatrical Enterprise* 280 Mich 425, 273 NW 756 (1937), *Grand Rapids Bd of Health v. Vink* 184 Mich 688, 151 NW 672 (1915), *Beck v. Railway Teamsters' Protective Union*, 118 Mich 497, 77 NW 13, 74 Am St Rep 421, 42 LRA 407 (1898); *Fitchette v. Taylor*, 191 Minn 582, 254 NW 910 (1934); *State ex rel. Rice v. Allen*, 177 S 763 (Miss, 1938); *Floyd v. Adler*, 96

Miss 544, 51 S 897 (1910); *National Pigments & Chemical Co v. Wright*, 118 SW(2d) 20 (Mo, 1938), *State v. Salley*, 215 SW 241 (Mo, 1919), *Cumberland Glass Mfg Co v. Glass Bottle Blowers' Ass'n*, 59 NJ Eq 49, 46 A 208 (1899); *City of Utica v. Ortnier*, 256 AD 1039, 10 NYS(2d) 729 (1939); *Barler v. Ringe*, 255 AD 976, 8 NYS(2d) 99 (1939), *rearg den* 9 NYS(2d) 581 (1939), *People ex rel. Bennett v. Lamon* 277 NY 368 14 NE(2d) 439 (1938), *Reed v. Littleton*, 275 NY 150, 9 NE(2d) 814 (1937), *Kaltenbach v. Benish* 252 AD 788, 299 NYS 276 (1937), *Rochester v. Gutberlett*, 211 NY 309, 105 NE 548, LRA1915D 209, Ann Cas 1915C 483 (1915), *Roper v. Leary*, 171 NC 35, 87 SE 945 (1916), *Renner Brewing Co v. Rolland*, 118 NE 118 (Ohio, 1917), *State Bar of Oklahoma v. Retail Credit Ass'n*, 37 P(2d) 954 (Okla, 1934), *McGuire v. Dexter*, 46 Dauph 226 (Pa 1939); *Ashinsky v. Levenson* 256 Pa 14 100 A 491, LRA1917D 994 (1917), *State v. City Club*, 83 SC 509 65 SE 730 (1909), *Fox v. Corbitt*, 137 Tenn 166, 194 SW 88 (1917), *City of Wink v. Griffith Amns Co* 78 SW(2d) 1065 (Tex Civ App, 1935), *Ex parte Allison*, 99 Tex 455, 90 SW 870, 122 Am St Rep 653, 2 LRA(NS) 1111 (1906), *Landen v. Kwass*, 123 Va 544, 96 SE 764 (1918), *Ingersoll v. Rousseau*, 35 Wash 92, 76 P 513, 1 Ann Cas 35 (1904).

87. In re Debs, 158 US 565, 15 S Ct 900 39 L Ed 1092 (1895); *Pierce v. Stablemen's Union*, 156 Cal 70, 103 P 324 (1909), *Jetton-Dekle Lumber Co. v. Mather*, 53 Fla 909, 43 S 590 (1907), *Jones v. Van Winkle Gin &*

Arizona anti-injunction act,⁸⁸ one of whose underlying purposes was to prevent the issuance of a labor injunction where the criminal law would be adequate to protect the complainant, was held unconstitutional by the United States Supreme Court upon the ground that the complainant's right to do business is entitled to the most efficient protection by virtue of the due process phrase of the 14th Amendment to the federal constitution, and that the labor injunction, being a more efficient remedy in labor disputes cases than the sanction of the criminal law, could not be taken away by the state legislature.⁸⁹

A fifth complaint against the labor injunction is that it has been employed to restrain the exercise of the right to free speech.⁹⁰

As a sixth argument, it has been asserted that summary punishment for contempt, for violation of a labor injunction, involves collision with the right to trial by jury.⁹¹

Mach Works 131 Ga 336, 62 SE 346 (1908); *Christensen v. Kellogg Switchboard & Supply Co.*, 110 Ill App 61 (1903); *State ex rel Hopkins v. Howat*, 109 Kan 376, 198 P 686 (1921), writ dismissed because of lack of federal constitutional question in *Howat v. Kansas*, 258 US 181 42 S Ct 277 66 L Ed 550 (1922); *Underhill v. Murphy*, 117 Ky 640 78 SW 482 (1904); *Vegelahn v. Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722, 57 Am St Rep 443 (1896) (the holding in which case, to the effect that picketing is illegal *per se*, was repudiated in *Simon v. Schwachman*, 18 NE(2d) 1 [Mass, 1938]); *Campbell v. Motion P. M. O. Co.*, 151 Minn 220, 186 NW 781 (1922); *Hamilton Brown Shoe Co. v. Saxey*, 131 Mo 212, 32 SW 1106 (1896); *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers Assn.*, 59 NJ Eq 49, 46 A 208 (1899); *Burgess Bros. v. Stewart*, 114 Misc 673, 187 NYS 873 (1921); *Dayton Mfg. Co. v. Metal Polishers Union*, 11

Ohio S & CP Dec 643 (1901); *State Lane & S. R. Co. v. Brown*, 11 Pa Dist R 509 (1902)

88 1913 Rev Stats Sec 1464 1928 Rev Code (Struckmeyer) Sec 4286

89 *Truax v. Corrigan* 257 US 312, 42 S Ct 124, 66 L Ed 254 27 ALR 375 (1921)

90. See *Marx, Jean Clothing v. Watson*, 168 Mo 135, 67 SW 391 (1902); *Truax v. Bisbee* 19 Ariz 379, 171 P 121 (1918); *Lindsay & Co. v. Montana Fed. of Labor*, 37 Mont 264, 96 P 127, 18 LRA(NS) 707, 127 Am St Rep 722 (1908) *Ex parte Tucker*, 220 SW 75 (Texas 1920); *Daily v. Superior Court*, 12 Col 94, 44 P 458 (1896) See also *Grosjean v. American Press Co.*, 297 US 233, 56 S Ct 444, 80 L Ed 660 (1936); *Pound, Equitable Relief Against Defamation and Injuries to Personality* (1910), 29 Harv Law Rev 640 For a discussion of the relationship between the injunction and free speech, see section 128, *infra*

91. For cases holding that the right

A seventh bone of contention arose from the fact that while equity professed never to grant injunctions against striking employees because to do so would be to enforce specifically the obligation to work, in violation of equity's historic limitations and constitutional prohibitions against involuntary servitude,⁹² strikes were just as effectively crushed by labor injunctions which restrained unions or others from inducing or calling a strike,⁹³ or from assisting, persuading, inciting, coercing or even consenting to a

to trial by jury is irrelevant to the machinery of equity involved in injunction proceedings see *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo 212, 32 SW 1106 (1895), *McCormick v. Local Union*, 32 Ohio CC 165 (1911), *Union P R Co v Ruef* 120 F 102 (CCD Neb, 1902), *Southern R Co v Machinists Local Union*, 111 F 49 (CCWD Tenn 1901). For cases holding unconstitutional statutes providing for trial by jury in labor injunction cases, see section 428, *infra*.

92 *Goldfield Cons Mines C v Goldfield Miners' Union* 159 F 500 (CCD Nev 1907), *J F Parkinson Co v Santa Clara County Bldg Trades' Council*, 154 Cal 581, 98 P 1027, 21 LRA(NS) 550, 16 Ann Cas 1165 (1908), *Greenwood v Building Trades Council*, 71 Cal App 159 233 P 823 (1925), *Jetton Dekle Lumber Co v Mather* 53 Fla 909 43 S 590 (1907), *Illinois Malleable Iron Co v Michalek* 279 Ill 221 116 NE 714 (1917), *Saulsbury v Coopers' Int'l Union* 147 Ky 170 143 SW 1018 39 LRA(NS) 1203 (1912), *Gray v Bldg Trades Council*, 91 Minn 171, 97 NW 663, 103 Am St Rep 477, 63 LRA 753, 1 Ann Cas 172 (1903), *Lohse Patent Door Co. v Fuelle*, 215 Mo 421, 114 SW 997, 128 Am St Rep 492, 22 LRA(NS) 607 (1908); *Booth v. Burgess*, 72 NJ Eq 181, 65 A 220 (1906); *Mills v. United States Printing Co.*, 90 AD 605, 91 NYS 185

(1904), *Sheehan v Levy*, 215 SW 229 (Tex Civ App 1919) *Contra Farmers L & T Co v N P R Co*, 60 F 803 (CCD Wis 1894), *Burgess v Georgia etc R Co* 148 Ga 415, 96 SE 864 (1918), *New Jersey Painting Co v Local No 26* 95 NJ Eq 108, 122 A 622 (1923), *Goldman v Cohen*, 222 AD 631, 227 NYS 311 (1928), *Trial of Boot & Shoe Makers of Philadelphia* (1806), *Harper v Local Union*, 48 SW(2d) 1033 (Tex Civ App, 1932)

93 *Toledo, etc R Co v Penna Co*, 51 F 730 19 LRA 387 (CCAND Ohio, 1893), *aff'd* 166 US 548, 17 S Ct 658 41 L Ed 111 (1897), *Barnes v Berry*, 156 F 72 (CC SD Ohio 1907), *Burgess v Georgia, etc R Co* 148 Ga 415, 96 SE 864 (1918), *Pieble v Architectural Iron W U* 260 Ill App 435 (1931), *Armstrong Cork & Insulation Co v Walsh*, 276 Mass 263, 177 NE 2 (1931), *Folsom v Lewis* 208 Mass 336 94 NE 316, 35 LRA(NS) 787 (1911), *W A Snow Iron Works v Chadwick*, 227 Mass 382, 116 NE 801 LRA1917F 755 (1917), *Gilchrist Co v Metal Polishers Union* 113 A 320 (NJ Ch 1919); *Grassi Contracting Co v Benett*, 174 AD 244, 160 NYS 279 (1916); *Purvis v. Local No. 500*, 214 Pa 348, 63 A 585, 112 Am St Rep 757, 12 LRA 642 6 Ann Cas 275 (1906), *Sheehan v Levy*, 238 SW 900 (Texas Civ App, 1922)

§ 30 LABOR DISPUTES AND COLLECTIVE BARGAINING

strike,⁹⁴ or from doing any act in furtherance of a strike.⁹⁵

In addition to these main objections which labor asserted to the underlying bases of the labor injunction and some of its consequences, complaints were had with the administration of the labor injunction. Frankfurter and Greene⁹⁶ cite a statement made by John W. Davis in 1912, as a member of the House of Representatives for the state of West Virginia, to the effect that the reported cases "show at least five glaring abuses which have crept into the administration of this remedy. I name them:

The issuance of injunctions without notice.

The issuance of injunctions without bond.

The issuance of injunctions without detail.

The issuance of injunctions without parties.

And in trade disputes particularly, the issuance of injunctions against certain well-established and indispensable rights."⁹⁷

⁹⁴ *Eagle Glass Co v Rowe*, 245 US 275, 38 S Ct 80, 62 L Ed 286 (1916), *U S v Railway Employees' Department*, 283 F 479 (DCND Illinois, 1922), *Armstrong v U S*, 18 F(2d) 371 (CCA 7, 1927), *Hardie-Tynes Mfg Co v. Cruse*, 188 Ala 66, 66 S 657 (1914), *Barnes v Chicago Typographical Union* 232 Ill 424, 83 NE 940, 14 LRA(NS) 1018, 13 Ann Cas 54 (1908), *Reynolds v. Davis*, 198 Mass 294, 84 NE 457, 17 LRA(NS) 162 (1908), *George Jonas Glass Co v Glass Bottle Blowers' Assoc* 77 NJ Eq 219, 79 A 262, 41 LRA(NS) 445 (1911), *Gevas v. Greek Restaurant Workers Club*, 99 NJ Eq 770, 134 A 309 (1926), *Long v. Bricklayers Int'l Union*, 17 Pa Dist 984 (1908)

⁹⁵ *Columbus Heating & Ventilating Co. v. Pittsburg Bldg. Trades Council*, 17 F(2d) 806 (DCWD Pa, 1927); *U. S. v Railway Employees' Department*, 283 F 479 (DCND Ill 1922); *U. S. v Uniaferro*, 290 F 214 (DCWD Va, 1922); *Hardie-*

Tynes Mfg Co v Cruse, 188 Ala 66 S 657 (1914), *Barnes v Chi Typographical Union*, 232 Ill 424, 83 NE 910, 14 LRA(NS) 1018 13 Ann Cas 54 (1908), *Rice Machine Co v Willard*, 136 NE 629 (Mass 1922), *United Shoe Mach Corp v. Fitzgerald*, 237 Mass 537 130 NE 86 (1921), *Baldwin Lumber Co v Local No. 560*, 91 NJ Eq 240, 109 A 147 (1920), *Benito Rovira Co, Inc v. Yampolsky*, 187 NYS 894 (1921); *A J. Monday Co v. Automobile Aircraft Workers*, 171 Wis 532, 177 NE 867 (1920).

⁹⁶ *The Labor Injunction* (1930) p 185

⁹⁷ 48 Congressional Record 6436 (1912). See *Gevas v. Greek Restaurant Workers Club*, 99 NJ Eq 770, 134 A 309 (1926) wherein the court brushed aside, by citing a case not precisely persuasive of the point raised, the union's contention that "no preliminary injunction should issue in this case because the allegations of the bill and the accompany-

Section 31. Labor's Resort to the Injunction.

In line with its general alternative tactic of utilizing existing law while at the same time condemning some of its consequences,⁹⁸ labor has more and more frequently been resorting to the injunction for the purpose of obtaining the swifter redress afforded by that remedy.⁹⁹ "The situations in which injunctions have been sought on behalf of labor are varied. Unions have resorted to the courts to prevent lockouts and breaches of trade agreements; to secure compliance with statutory requirements by employers; to protect union pickets from violence by company guards and union members from discharge, blacklisting or eviction; to prevent interference with labor meetings and the enforcement of local ordinances against labor activities; and in yet other contingencies."¹ Jurisdictional disputes have also been a prolific cause for labor's resort to injunctions.² It is nevertheless still true that labor has resorted to the injunction but sparingly, preferring to rely upon its economic strength as the basis of its position in the light of the particular circumstances. As has been observed, "While labor insists that the terms agreed upon should be embodied in a written agreement enforceable in the courts, it considers the aid of the court in enforcement of the

ing affidavits are met by a full and complete denial in the affidavits of the defense."

⁹⁸ See section 26, *supra*. The statement in the text is meant to be analytical and not critical. See, for example, Witte, *Labor's Resort to Injunctions* (1930), 39 Yale L Jour 374, 380: "Union officials and attorneys who have steadfastly counselled against the use of injunctions by labor are quite free to admit that there are situations in which such injunctions can be used very effectively."

⁹⁹ See Mason, *Organized Labor as Party Plaintiff in Injunction Cases* (1930) 30 Col L Rev 466; Witte, *Labor's Resort to Injunctions* (1930) 39

Yale L Jour 374, Simpson, *Fifty Years of American Equity* (1936) 50 Harv L Rev 171, 193-205

1. Witte, *Labor's Resort to the Injunction* (1930) 39 Yale L Jour 374, 375.

2. See *Nann v Raimist*, 255 NY 307, 174 NE 690, 73 ALR 669 (1931) where Cardozo, C. J. commented upon the ludicrous situation wherein a member of one union debating an industrial dispute with a member of another, is restrained by the solemn mandate of an injunction from stating his belief that the rival union is a 'scab'." See sections 131-133, *infra*, for a discussion of the legality of picketing in jurisdictional disputes.

agreement secondary in importance to its own organized power.”³

Section 32. Trespass.

The category of trespass has been a legal wrong involved in a great number of cases growing out of labor disputes.⁴ Adjoining landowners, however, have not been permitted to complain that picketing constitutes a trespass as to them.⁵ It has been held that where some of many pickets trespass upon property, others may be held for trespass though not themselves guilty thereof, where the group may be said to be engaged in a common enterprise.⁶ In some cases trespass appears as the ground of legal wrong, but the procedure or punishment take different forms. Thus, for example, in *People on Complaint of Koester v. Rozensweig*,⁷ pickets engaged in picketing on the grounds of the New York World's Fair were held guilty of disorderly conduct. Trespass on private property of the Fair was the basis of holding the defendants to have breached the peace. In *Seagate*

3. Lieberman, *The Collective Labor Agreement* (NY, 1940) p. 24.

4. See *Illinois C. R. Co. v. Int'l Assn.*, 190 F. 910 (CC ED Ill. 1911); *Great N. Ry. Co. v. Brosseau*, 286 F. 414 (DC N. Dak., 1923); *Gasaway v. Borderland Coal Corporation*, 278 F. 56 (CCA 7, 1921); *Charleston Dry Dock & Mach. Co. v. O'Rourke*, 274 F. 811 (DC ED SC., 1921); *Sloss-Sheffield Steel & I. Co. v. Prior*, 151 Ala. 576, 44 S. 649 (1907); *J. I. Parkinson Co. v. Building Trades Council*, 154 Cal. 581, 98 P. 1027, 21 LRA(NS) 550, 16 Ann. Cas. 1165 (1908); *Christensen v. Kellogg Switchboard Supply Co.*, 110 Ill. App. 61 (1903); *Vanderschmitt v. McGuire*, 100 Ind. App. 632, 195 NE 585 (1925); *Webber v. Barry*, 66 Mich. 127, 33 NW 389, 11 Am. St. Rep. 466 (1887); *People on complaint of Koester v. Rozensweig*, 171 Misc. 702, 13 NYS(2d) 795 (1939); *Seagate Asso-*

ciation v. Seagate Tenants Association, 168 Misc. 742, 6 NYS(2d) 387 (1939) aff'd 11 NYS(2d) 212 (1939); *NYR Co. v. Wenger*, 9 Ohio Dec. Reprint 815 (1887); *Hillenbrand v. Building Trades Council*, 14 Ohio S. & C.P. Dec. 628 (1904); *Longshore Printing & Pub. Co. v. Howell*, 26 Or. 527, 38 P. 547, 28 LRA 461, 46 Am. St. Rep. 640 (1894); *Reners v. Rex* (1926) (Canada) SCR 499; *Larkin v. Belfast Harbour Comrs.* (1908) 2 Ir. R. (KB) 214; *McCusker v. Smith* (1918) 2 Ir. R. 432. Div. Ct. See also *Interborough Rapid Transit Co. v. Lavin*, 247 NY 65, 159 NE 863 (1923).

5. *Robison v. Hotel & Restaurant Employees Local*, 35 Idaho 418, 207 P. 132 (1922).

6. *Reners v. Rex* (1926) (Canada) SCR 499.

7. 171 Misc. 702, 13 NYS(2d) 795 (1939).

Association v. Seagate Tenants Association,⁸ pickets were stopped by the mandate of injunction from continuing their activities, but here, as in the *Rozensweig* case, the fact that a privately owned and enclosed community was involved was the gravamen of the complaint, and trespass the underlying ground of legal theory.

Striking employees remaining on their employers' property have been enjoined in several cases because their activity constituted trespass.⁹ The sit-down strike is an outstanding illustration of the operation of trespass in the field of injunctions.¹⁰

One of the provisions of the Clavton Act is to the effect that no injunction shall be granted to restrain "any person or persons from attending at any place or places where such person may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work, or to cease from working. . . ." It was contended on behalf of labor unions that this provision authorized striking employees to go upon the property of the employer for the purpose of persuading others to join the strike, but in *Great Northern R. Co. v. Brosseau*,¹¹ the contention was rejected, the view being taken in that case that the Clavton Act did not authorize trespass. A similar view was taken by an English court in

⁸ 168 Misc 742, 6 NYS(2d) 387 (1939) aff'd 11 NYS(2d) 232 (1939).

⁹ *Great Northern R. Co. v. Brosseau* 286 F 414 (DCD N Dak 1923); *Illinois C. R. Co. v. International Assn* 190 F 910 (CC ED Ill 1911); *Charleston Dry Dock & Mach Co. v. O'Rourke*, 274 F 811 (DC ED SC, 1921); *Gloss Sheffield Steel & I Co. v. Prior*, 151 Ala 576, 44 S 649 (1907); *Christensen v. Kellogg Switchboard Supply Co* 110 Ill App 61 (1903); *Webber v. Barry*, 66 Mich 127, 33 NW 380, 11 Am St Rep 466 (1887); *Hillenbrand v. Building Trades Council*, 14 Ohio S & CP Dec 028 (1904); *N. Y., L. E. & W. R. Co. v. Wenger*, 9 Ohio Dec Reprint 815

(1887). A single act of trespass committed by a union leader in calling out workmen will not justify the issuance of an injunction. *J. F. Parkinson Co. v. Building Trades Council*, 154 Cal 581, 98 P 1027, 21 LRA(NS) 550, 16 Ann Cas 1165 (1908); *Longshore Printing & Pub Co. v. Howell*, 26 Or 527, 38 P 547, 28 LRA 464, 46 Am St Rep 640 (1894).

¹⁰ See section 106, *infra*, for a discussion of the legality of the sit-down strike at common law. Section 319, *infra*, discusses the sit down strike in connection with the National Labor Relations Act.

¹¹ 286 F 414 (DCD ND 1923)

connection with the English Trade Disputes Act of 1906,¹² of which the Clayton Act is said to be almost a copy.¹³

Trespass is a difficult obstacle to circumvent when labor unions seek to bring new members into the fold. In many instances, and especially in company towns and situations involving large plants, union organizers have found it necessary to go upon the lands of the employer to attempt persuasion of employees. On the theory of a continuing trespass, equity has assumed jurisdiction to grant injunctive relief and has exercised the weapon of injunction against entry by organizers upon the employer's premises. The position of the workingman in company towns has been critically summarized as follows: "It is evident that for isolated non-union company towns in which the employer owns all the land, no effective steps have been taken to obtain for the employees the practice of those 'immemorial rights' of free speech and free assemblage which are supposedly guaranteed by state and federal constitutions. There is no place where a meeting to criticize the employer's policy may be held. The employer controls the job and the political machinery; he dominates the school, the church, the organized amusements, the local business and professional men and often all medical services. The employee's freedom is limited to activities which do not tend to weaken the employer's control. Democracy is an empty mockery."¹⁴ In *Thornhill v. Alabama*,¹⁵ where the United States Supreme Court held unconstitutional a state statute aimed at picketing in labor disputes, upon the ground that it was in effect a blanket prohibition aimed at all forms of persuasion, the suggestion was made that trespass might be an inappropriate ground of legal sanction, where company towns are involved. The court's language, set forth in a footnote to its opinion, states: "The fact that the ac-

12. *Larkin v. Belfast Harbour Comrs.* [1908] 2 Ir R (KB) 214; *McCusker v. Smith* [1918] 2 Ir R 432—Div Ct.

13. See *Great Northern R. Co. v. Broseau*, 286 F 414 (DCD ND 1923).

14. *Davis, Company Towns*, 4

Ency. of the Soc. Sci. 119, 122-123 (1930). See also Witt Bowden, in "Freedom of Inquiry and Expression" (1938) edited by Edward P. Cheyney.

15. 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940).

tivities for which petitioner was arrested and convicted took place on the private property of the preserving company is without significance. Petitioner and the other employees were never treated as trespassers, assuming that they could be, where the company owns such a substantial part of the town."

It has been held under the National Labor Relations Act that eviction by an employer of his employees from company houses, if designed to discourage union activity, constitutes an unfair labor practice,¹⁶ and that an employer has no right to exclude labor organizers from his property where his employees inhabit company houses.¹⁷

Section 33. Nuisance.

The number of cases wherein the sanction of nuisance has been held applicable to the activities of organized labor are by no means unsubstantial.¹⁸ It has even been held in one case that picketing is such a nuisance as to be beyond the power of the legislature to legalize.¹⁹

Section 34. Barratry.

Barratry, it will be recalled, is "the crime or offense of

16. See *infra*, section 289.

17. See *infra*, section 289.

18. *Otis Steel Co. v. Local Union*, 110 F 698 (CCND Ohio, 1901); *Dail-Overland Co. v. Willys Overland*, 263 F 171 (DCWD Ohio, 1919), same case on appeal, *Quinlivan v. Dail Overland Co.* 274 F 56 (CCA 6, 1921), *Ellis v. Journeymen Barbers International*, 194 Iowa 1179 191 NW 111 (1922), *Bull v. Int'l Alliance* 119 Kan 713, 241 P 459 (1925), *Musie Hall Theatre v. M. P. M. O. U.* 249 Ky 639, 61 SW(2d) 283 (1933), *F. C. Church Shoe Co. v. Turner*, 218 Mo App 516, 279 SW 232 (1925), *Joe Dana Market v. Wentz*, 223 Mo App 772, 20 SW(2d) 567 (1929); *Iverson v. Dilno*, 44 Mont 270, 119 P 719 (1911); *Atkins v. W. A. Fletcher Co.* 65 NJ Eq 658, 55 A 1074

(1903), *Berg Auto Trunk Specialty Co. v. Wiener*, 112 Misc 796, 200 NYS 745 (1923); *Specialty Bakers of America v. Rose*, NYLJ August 8th, 1933, p. 707, *Eureka Foundry Co. v. Lecker*, 13 Ohio S & CP Dec 393 (1902); *Vulcan Iron Works v. Winnipeg Lodge* (1911) 21 Manitoba LR 473 *Contra Empire Theatre Co. v. Cloke*, 53 Mont 183, 163 P 107 (1917)

19 *Elkind v. Retail Clerks*, 114 NJ Eq 586, 169 A 494 (1933). This is not the present New Jersey law. See *Feller v. Local 144*, 121 NJ Eq 452, 191 A 111 (1937); *Mitnick v. Furniture Workers Union*, 124 NJ Eq 147, 200 A 553 (1938), appeal dismissed upon the ground that the parties had in the interim effected an adjustment of the controversy, 125 NJ Eq 142, 4 A(2d) 277 (1939)

frequently stirring up suits and quarrels between individuals, either at law or otherwise.”²⁰ While it is difficult to find reported cases wherein labor organizers have been guilty of barratry for engaging in organizing activities, labor insists that the sanction of barratry is often employed. The New York Times of February 24th, 1935, and April 15th, 1935, gives accounts of proceedings wherein the organizing of sharecroppers was held to constitute barratry.

Section 35. Vagrancy.

Union organizers have no visible means of employment, other than that of going around and stirring up trouble for a price, according to some of the more outspoken critics of the labor movement. Among local officials of such a frame of mind, the offense of vagrancy is often used as a legal sanction to deter labor organization. The extent of such use is not readily ascertainable. Statements in the nature of propaganda, made by positionists much to the left of center, and also by those much to the right, have undoubtedly surcharged with a good deal of exaggeration or under-evaluation the extent of utilization of the sanction of vagrancy. It is nevertheless true that the offense of vagrancy has played a part as a legal weapon employed in labor disputes. A note writer in the California Law Review, writing on the subject “Who is a Vagrant in California,”²¹ has thus indicated the extent of the employment of the offense of vagrancy in that state: “That our present vagrancy laws confer a dangerous discretionary power on police officers has been clearly demonstrated within the last year. For example, the law is used during industrial disputes to arrest strikers and their leaders at strategic times and in strategic places; in many cases charges are dismissed without any show of prosecution.”²² This procedure, particular-

20. 7 CJ 925

21. 23 Cal L Rev 506, 508 (1935).

22. The writer here cites the California cases of *People v Jackson*, No 93, January 22, 1935 (Mem. Opinion), quoted from at length in the Recorder of January 24, 1935, *People v.*

Black (No 94) and *People v. Wilson* (No 96) “In the Jackson case,” says the writer, “police officials testified to having arrested 375 men at one time charging them with vagrancy—most of the arrests being made in a union hall.”

ly with respect to Communists, is exposed and condemned in the recent memorandum opinion of the Appellate Department of the Superior Court of San Francisco County." Insistence upon the character of American public jurisprudence as a system governed by laws, not men, must necessarily involve concern over the degree of certainty contained in legal sanctions. The offense of vagrancy does not measure up to the standard of certainty thus required.

Section 36. Unlawful Assembly.

The extent of utilization in connection with the legal sanction of unlawful assembly is obviously unascertainable because hidden in unreported lower court cases and in the actions of local executive authorities. That labor activities have been subjected to the legal sanction cannot be doubted. Cases involving street meetings in connection with labor disputes, and governmental action in that regard, have been so numerous that only an extensive survey of the newspapers in the various cities of the several States would reveal their extent²³

Constitutional Law governing unlawful assembly is at present in a state of uncertainty. In *Davis v. Massachusetts*,²⁴ the United States Supreme Court held constitutional a Boston ordinance prohibiting, among other things, any person from making any public address on any public grounds of the City without a permit from the Marshal, as against the contentions that the ordinance was not within the police power and was violative of the 14th Amendment to the Federal Constitution. The Supreme Judicial Court of Massachusetts had said in the *Davis* case: "for the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public, than for the owner of a private house to forbid it in his house." On appeal to the United States Supreme Court these words were quoted with approval. The ordinance was assailed for the further

23. See *State v. Butterworth*, 104 NJL 579, 142 A 57 (1928); *McGehee v. State*, 23 Tex App 330 (1887).

24. 167 US 43, 17 S Ct 731, 42 L Ed 71 (1897).

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reason that, even assuming the existence of the power in the State or Municipality to control absolutely the highways and parks, the enactment was void because arbitrary and unreasonable. The High Court, however, thought little of the argument. "The right to absolutely exclude all right to use," said the Court, "necessarily includes the authority to determine under what circumstances such use may be availed of, as the greater power contains the lesser."

The consequences of that decision were widespread. In *City of Duquesne v. Fincke*,²⁵ an ordinance requiring a permit to hold public meetings in the streets was held valid and the Mayor's action in refusing to grant a permit requested by opposing factions in connection with a strike was upheld. The court stated that there is no right inherent in the citizen to hold a public meeting in the street without a permit to do so. *Davis v. Massachusetts* was cited in support of the case. In the later Pennsylvania case of *Commonwealth v. Egan*,²⁶ the holding in the Duquesne case was confirmed and the denial of the permit to a group which desired to demonstrate in connection with the unemployment situation was held proper. In *Thomas v. Casey*,²⁷ a Jersey City ordinance which forbade parades and public assemblies on the highways and in the parks of the City without a permit was held valid. The Court cited the *Davis* case in support of its holding. The *Davis* case was also cited in *People v. Atwell*,²⁸ where a Mt. Vernon ordinance was held valid which prohibited the "gathering or assembling of persons upon the public streets of the City, the holding of public meetings upon the public streets of the city, the congregating of persons in groups or crowds upon the public streets of the City, without special permit of the Mayor" and in *Coughlin v. Chicago Park District*,²⁹ which held that a Park Commissioner's refusal to permit the use of a park designed primarily as an athletic stadium, for the purpose of public address on social and economic ques-

25. 260 Pa 112, 112 A 130 (1921)

26. 113 Pa Super 375, 173 A 764 (1934).

27. 121 NJL 185, 1 A(2d) 866 (1938).

28. 232 NY 96, 133 NE 64 (1921).

29. 304 Ill 90, 4 NE(2d) 1 (1936).

tions, was not an infringement of the right to freedom of speech.

This was the state of the law when in 1939 the United States Supreme Court decided the case of *Hague v. Committee for Industrial Organization*.³⁰ In that case the constitutionality of a municipal ordinance was assailed which required the obtaining of a permit for any public assembly upon the public streets, highways, public parks or public buildings of the City. The director of public safety was authorized under the ordinance to refuse issuance of a permit if, after investigation, he believed that a denial of the permit was necessary to prevent "riots, disturbances, or disorderly assemblage." The ordinance was held unconstitutional and void, but the Court failed to agree upon the reasoning by which it reached its conclusion. Mr. Justice Frankfurter and Mr. Justice Douglas took no part in the consideration or the decision of the case while Mr. Justice McReynolds and Mr. Justice Butler dissented from the holding of the Court. Two opinions were written, one by Mr. Justice Roberts in which Mr. Justice Black concurred and the other by Mr. Justice Stone, in which Mr. Justice Reed concurred. Mr. Chief Justice Hughes concurred in the reasoning contained in Mr. Justice Roberts's opinion. Mr. Justice Roberts drew a distinction between the right possessed by a citizen of the United States under the privileges and immunities phrase of the Constitution as supplemented by Section 1 of the 14th Amendment, and that possessed by persons under the due process clause of the 14th Amendment. The individual complainants who were disseminating information in connection with the rights of employees under the National Labor Relations Act were denied the right by the ordinance, he said, to disseminate information connected with the rights of individuals under a National enactment. The implication of Mr. Justice Roberts's opinion is that the ordinance would be unassailable under Federal law or the Federal Constitution were it limited to assembly in connection with rights secured by

30. 307 US 496, 59 S Ct 954, 83 L Ed 1423 (1939).

State laws or Constitutions. Mr. Justice Stone's opinion took issue with the reasoning of the opinion of Mr. Justice Roberts, Mr. Justice Stone preferring to base the invalidity of the ordinance upon the fact that it impaired the general right to freedom of speech, which was a right flowing, he said, not from the privilege and immunities phrase of the Federal Constitution as re-enforced by Section 1 of the 14th Amendment, but rather from the due process clause of the 14th Amendment. Since there is no opinion of the Court in the Hague case, it is difficult to state narrowly the holding of the case. However, in a later United States Supreme Court case, *Madden v. Kentucky*,³¹ the Court said in connection with the position taken by the Hague case: "This position is that the privileges and immunities clause protects all citizens against abridgment by States of rights of National citizenship as distinct from the fundamental or natural rights inherent in State citizenship." This leaves the right to unlawful assembly in an equivocal circumstance, for there seems under the Hague case to be a Federal Constitutional right to discuss National matters without any counterpart right similarly to discuss State matters. That such a proposition is the present law is not, however, at all clear. In the Hague case, the action was commenced in a Federal Court and jurisdiction was upheld because the complainants were held by the Court to be seeking redress of a National right. The Hague case may very well be distinguished upon this ground in subsequent cases and the view taken that the right to assembly is a Federal right whether exercised in connection with State or National matters.³²

31. 309 US 83, 60 S Ct 406, 84 L Ed 406, 125 ALR 1383 (1940).

32. It has been settled by a long line of United States Supreme Court cases that the rights to free speech and lawful assembly are rights guaranteed to all persons against state impairment by the Fourteenth Amendment. See *Gitlow v. New York*, 268 US 652, 45 S Ct 625, 69 L Ed 1138 (1925); *Whitney v. Cali-*

forma, 274 US 357, 47 S Ct 641, 71 L Ed 1095 (1927); *Fiske v. Kansas*, 274 US 380, 47 S Ct 655, 71 L Ed 1108 (1927); *Stromberg v. California*, 283 US 359, 51 S Ct 532, 75 L Ed 1117, 73 ALR 1484 (1931); *Near v. Minnesota*, 283 US 697, 51 S Ct 625, 75 L Ed 1357 (1931); *Grosjean v. American Press Co.* 297 US 233, 56 S Ct 444, 80 L Ed 660 (1936); *DeJonge v. Oregon*, 299 US 353, 57

In any event, the authority of the Davis case has definitely been affected by the Hague case. The underlying assumption of the Davis case, to wit, that the City has absolute title to its parks and other public places such as to justify an ordinance of any kind, was questioned in the opinion by Mr. Justice Roberts who said: "Wherever the title of streets and parks may rest they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such use of the streets and park places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens."

The right of the general public to use the streets, the parks and other public places as an incident to the right of free speech, free press or freedom of religion, was emphasized in three recent United States Supreme Court decisions. In the first, *Carlson v. California*,³³ a California anti-picketing ordinance was held unconstitutional as interfering with the right to free speech, while in the second, *Thornhill v. Alabama*,³⁴ an Alabama anti-picketing statute was held unconstitutional for the same reason. The third, *Cantwell v. Connecticut*,³⁵ involved the constitutionality of a state anti-solicitation statute under which Cantwell was convicted for going from house to house with books and pamphlets which attacked organized religions, and for walking around the streets with a portable phonograph which he played upon being granted permission by anybody whom he accosted and from which phonograph there was emitted propaganda attacking the Catholic Church. The statute was held unconstitutional as a deprivation of free speech and the free right to religious worship. The court emphasized that Cantwell "was upon a public street, where

S Ct 255, 81 L Ed 278 (1937), *Hendon v. Lowry*, 301 US 242, 57 S Ct 732, 81 L Ed 1066 (1937); *Lovell v. Griffin*, 303 US 444, 58 S Ct 666, 82 L Ed 949 (1938).

33. 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940).

34. 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940).

35. 310 US 296, 60 S Ct 900, 84 L Ed 1213 (1940).

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he had a right to be, and where he had a right peacefully to impart his views to others."

In *People v. Ribinovich*,³⁶ where a Park Commissioner's regulation was unsuccessfully sought to be a bar to peaceful picketing on a public boardwalk, the Court noted that the authority of the Davis case was questioned by the Hague case.

Section 37. Ordinances Aimed at Distribution of Circulars, Pamphlets and Newspapers.

Labor activities involve in many instances the distribution of numerous forms of circulars and pamphlets and in some instances the circulation of newspapers. Ordinances prohibiting such distribution or circulation without a license, which are in many instances difficult if not impossible to obtain, are thus seen to be a legal sanction which constitutes a stumbling block to labor activity. In a number of cases punishment has been meted out to the representatives of labor unions because of their distribution of circulars and pamphlets or their circulation of newspapers without a license or permit as required by the ordinance.³⁷ The authority of these cases has been questioned if not totally destroyed, however, by United States Supreme Court holdings to the effect that such ordinances are unconstitutional as impairing the rights to free speech and free press. In *Lovell v. Griffin*,³⁸ an ordinance which forbade the distribution by hand or otherwise of literature of any kind without written permission from the city manager was held void as an interference with the right to free press. In *Schneider v. New Jersey*, *Young v. California*, *Snyder v. Milwaukee*, and *Nichols v. Massachusetts*, the

36. 171 Misc 569, 13 NYS(2d) 135 (1930).

37. *Watters v. City of Indianapolis*, 191 Ind 671, 134 NE 482 (1922); *Comm. v. Haffner*, 279 Mass 473, 180 NE 616 (1932); *State v. Butterworth*, 104 NJL 579, 142 A 57 (1928); *City of Duquesne v. Fineke*, 269 Pa 112, 112 A 130 (1921); *Mc-*

Gee v. State, 23 Tex Cr Rep 330, 55 SW 222 (1887); *City of Milwaukee v. Kassen*, 201 Wis 1383, 234 NW 352 (1931). See also *People v. Armentrout*, 118 Cal App 761, 1 P(2d) 558 (1931); *Commonwealth v. Kimball*, 13 NE(2d) 18 (Mass 1938).

38. 303 US 444, 58 S Ct 666, 82 L Ed 949 (1938).

United States Supreme Court with one opinion³⁹ disposed of four ordinances by holding them unconstitutional, which prohibited the distribution of handbills. In the *Schneider* case, the petitioner canvassed in behalf of the Watch Tower Bible and Tract Society as one of "Jehovah's witnesses"; in the *Young* case a notice of meeting to be held under the auspices of the "Friends Lincoln Brigade" at which speakers were to discuss the Spanish Civil War was being distributed; in the *Snyder* case the petitioner was a picket who distributed handbills in front of a meat market involved in a labor dispute, while in the *Nichols* case the appellants distributed leaflets in the street, announcing a protest meeting in connection with the administration of State Unemployment Insurance. It was contended that the city's interest in preventing littering of the streets justified such enactment, but the Court thought otherwise, saying, "we are of opinion that the purpose to keep the streets clean and of good appearance are insufficient to justify an ordinance which prohibits persons rightfully on a public street from handing literature to one willing to receive it. Any burden imposed upon the city authorities in cleaning and caring for the streets as an indirect consequence of such distribution results from the constitutional protection of the freedom of speech and press."

Section 38. Statutes and Ordinances Aimed at Picketing.

Statutes and ordinances intended to ban the exercise of picketing, whether generally or in connection with labor disputes, have been upheld in several cases.⁴⁰ In *People v.*

³⁹ 308 US 147, 60 S Ct 146, 84 L Ed 155 (1939)

⁴⁰ *Ferguson v. Peake*, 18 F(2d) 166 (DC App 1927); *Ex parte Williams*, 158 Cal 550, 111 P 1035 (1910); *People v. Armentrout*, 118 Cal App 761, 1 P(2d) 556 (1931); *Thomas v. City of Indianapolis*, 195 Ind 440, 145 NE 550 (1924); *Watters v. Indianapolis*, 191 Ind 671, 134 NE 48 (1922); *I. L. G. W. U. v. Mayor*, 2 LRR 435 (Md, 1937); *Common-*

wealth v. McCafferty, 145 Mass 384, 14 NE 451 (1888); *Commonwealth v. Challis*, 8 Pa Super Ct 130 (1898), *Ex parte Stout*, 82 Tex Cr 183, 198 SW 967, LRA1918C, 277 (1917). Picketing has also been held illegal under antitrust statutes. See *Webb v. Cooks' Union*, 205 SW 465 (Tex Civ App 1918). In *State v. Personett*, 114 Kan 680, 220 P 520 (1923) a statute was upheld which made picketing, among other things,

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Armentrout,⁴¹ where an ordinance directed against picketing was upheld, it appeared that the labor union, engaged in a controversy with a theatre which had allegedly locked out the members of the union, caused to be printed in a newspaper published by the labor movement in the city, a headline stating "Rialto, Broadway, are yet on the unfair list." The edition of the newspaper wherein the headline appeared was one which was especially prepared for the union in connection with the dispute. News-boys were then stationed at the theatre to cry the headlines of the newspaper. They were convicted under the anti-picketing ordinance. On appeal they contended that they did not come within its purview because they were merely selling newspapers. The court, however, drew a distinction between utilization of the newspaper as a means of avoiding the statute and similar utilization in connection with a bona fide effort to sell the newspaper. "Neither the sale of the newspaper nor its display would constitute a violation of the ordinance. Nor would it be a violation of the ordinance to cry out the headlines as a part of an appeal to buy the newspaper, whatever form that appeal might take. If the evidence in the record indicated that the defendants confined themselves to announcing 'Extra, Read the Citizen. All about the Rialto Theatre being unfair,' or words to similar effect, the judgment could not be upheld." The court found, however, that the words "Rialto Theatre unfair to labor" were not used in connection with an appeal to read the newspaper. Hence, said the court, the words were intended to achieve the results denounced in the ordinance under cover of the sale of a newspaper which was, in fact, not offered for sale or sold.⁴²

In a number of cases, however, such statutes or ordinances have been held invalid upon any one of six different

unlawful where carried on in connection with certain industries covered by the statute. See also *Frend v. United States* 100 F(2d) 691, 69 App DC 281 (CA DC 1938), cert den 306 US 640, 59 S Ct 488, 83 L Ed 1040 (1939); *Adams v Walla Walla*,

196 Wash 268, 82 P(2d) 584 (1938).

41. 118 Cal App 761, 1 P(2d) 556 (1931).

42. See also *Blumauer v. Portland Union*, 141 Or 399, 117 P(2d) 1115 (1933).

grounds.⁴³ A first class of holdings is to the effect that the enactment is invalid because vague in the light of the absence of any definition of "picketing."⁴⁴

A second group of cases holds the ordinance void because beyond the power of the municipality or because not constituting a proper exercise of the police power.⁴⁵ In *People v. Gidaly*,⁴⁶ a Los Angeles ordinance which forbade picketing except where a majority of the employees who have been employed for a period of thirty days prior to the commencement of the picketing go out on strike, was declared invalid upon the ground that the classifications of the ordinance had no relevance to the purpose of the law. Said the Court: "There is nothing in any experience to which our attention has been called and we see nothing in reason to suggest that pickets at a place where a minority of the employees are on strike will be any more given to violence . . . than those where a majority strike. Neither does it appear that the length of time a picket has been employed at the place he pickets bears any rational relation to the probability of his acting in a manner contravening the objects of this ordinance."

In the third type of cases, ordinances are held invalid because in conflict with the policy evidenced by anti-injunction legislation adopted by the given state.⁴⁷

In the fourth group of decisions, the statute or ordinance is held unconstitutional because constituting an interference with the right to free speech.⁴⁸ The connection of pick-

43. See also *supra*, section 37

44. *Thornhill v. Alabama*, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940). *Carlson v. California*, 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940). *Re Harder*, 9 Cal App(2d) 153 49 P(2d) 304 (1935). *Diemer v. Weiss*, 122 SW(2d) 922 (Mo 1938) c/f *People v. Gidaly*, 93 P(2d) 660 (Cal 1939). *State ex rel. Meredith v. Borman*, 189 S 669 (Florida, 1939). The cases of *Hardie Tynes Mfg Co v Cruse*, 189 Ala 66, 66 S 657 (1914) and *O'Rourke v. Birmingham*, 27 Ala App 133, 168

S 206 (1936), cert den 232 Ala 355, 168 S 209 (1936) are bad law in the light of *Thornhill v. Alabama*, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940)

45. *People v. Gidaly*, 93 P(2d) 660 (Cal 1939). *State ex rel. Meredith v. Borman*, 189 S 669 (Fla 1939)

46. 93 P(2d) 660 (Cal 1939)

47. *Local Union v. Kokomo* 5 NE (2d) 624, 108 ALR 1111 (Ind 1937); *City of Yakima v Gorham*, 94 P(2d) 180 (Wash 1939)

48. *Ex parte Lyons*, 27 Cal App 93

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eting with the right to free speech is hereafter more fully discussed.⁴⁹

The fifth ground upon which statutes or ordinances directed against picketing have been held void is that the enactments include within their terms other lawful conduct to which the statutory enactments cannot constitutionally extend and the proscription against picketing is so interwoven with the terms of the statutes as to make the entire enactments void.⁵⁰

The sixth ground is that the ordinance is void because interfering with "legitimate" means of carrying on a boycott, and as such repugnant to the fourteenth amendment to the federal constitution.⁵¹

Section 39. Extortion.

Exaction of fines by labor leaders under threat to strike has been subjected to the legal sanction of extortion, along with the crime of conspiracy.⁵² The extent to which labor

(2d) 293, 81 P(2d) 190 (1938). *Patterson v. Journeymen & Barbers International Union*, 5 LRR 20 (Cal 1939). *People v. Harris*, 104 Colo 386, 91 P(2d) 989, 112 ALR 1034 (1939). *City of Reno v. Second Judicial District*, 95 P(2d) 994, 125 ALR 948 (Nev 1939). See *Thornhill v. Alabama*, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940). *Carlson v. California*, 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940). See also *St. Louis v. Gloner*, 210 Mo 502, 109 SW 30, 124 Am St Rep 750, 15 LRA(NS) 975 (1908). *St. Louis v. Kaplan*, 109 SW 33 (Mo 1908); *St. Louis v. Sagan*, 109 SW 33 (Mo 1908); *St. Louis v. Abramovitz*, 109 SW 33 (Mo 1908).

49. See sections 135-140, *infra*.

50. *Hall v. Johnson*, 87 Or 21, 169 P 515, Ann Cas 1918E, 49 (1917); *State ex rel. Nield v. Kimble*, 1-A LRR 682 (Md 1937). See also *Thornhill v. Alabama*, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940); *Carlson v.*
34

California, 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940).

51. See *People v. Young*, 2 LRR 590 (California, 1938) holding unconstitutional an ordinance of the City of Long Beach.

52. *People v. Seefeldt*, 310 Ill 441, 141 NE 829 (1923). *People v. Curran*, 207 Ill App 264 (1917) aff'd 286 Ill 302, 121 NE 637 (1918). *People v. Quesne*, 310 Ill 467, 142 NE 187 (1923). *State v. Dalton*, 134 Mo App 517, 114 SW 1132 (1908). *People v. Barondess*, 133 NY 649, 31 NE 240 (1892); *People ex rel. Short v. City Prison*, 145 AD 861, 130 NYS 698, 26 NY Crim Rep 285, aff'd 206 NY 632, 99 NE 1116 (1912). *People v. Hughes*, 137 NY 20, 32 NE 1195 (1893); *People v. Wilzig*, 4 NY Crim Rep 403 (1886); *People v. Commerford*, 233 AD 2, 251 NYS 132 (1931); *People v. Weinsheimer*, 117 AD 603, 102 NYS 579 (1907). See *People v. Pouchot*, 174 Ill App 1 (1912), for application of the crime of conspiracy

unions have been guilty of extortion is a matter as to which there have been many rumors and an equal number of denials. Those unfriendly to labor have contended that a number of labor leaders have utilized labor unions and labor activities as means of extortion. Friends of the labor movement have replied that labor leadership is in the main an honest leadership and that many, if not all, instances of extortion, with few exceptions, have involved instances of racketeer attack upon and taking over of labor unions for personal gain.⁵³

In *People v. Commerford*,⁵⁴ the defendants, union delegates, withdrew a hoisting engineer from a concrete job in which the complainant was engaged, presumably because the complainant was engaged in business relations with a company having non-union truck drivers. It appeared, however, that the real reason for withdrawing the hoisting engineer from the job was to coerce the complainant into contracting with another company for the furnishing of the material theretofore furnished by the person assertedly having non-union truck drivers. The indictment

to the situation of obtaining money by false pretenses *c/f* *Day v. Studebaker Bros. Mfg. Co.* 13 Misc 320, 34 NYS 463 (1895) where an employee who sought to recover from an employer an alleged non due payment made under threat of discharge was denied relief.

Monies paid by an employer to a labor union to avert a strike or as a fine for alleged violation of a union rule may be recovered back in quasi-contract, having been paid under compulsion. *March v. Bricklayers Union* 79 Conn 7, 63 A 291 118 Am St Rep 127, 6 Ann Cas 848, 4 LRA(NS) 1198 (1900); *Carew v. Rutherford*, 106 Mass 1, 8 Am Rep 237 (1870). *c/f* *Bohn Mfg. Co. v. Hollis*, 54 Minn 223, 55 NW 1119, 40 Am St Rep 319, 21 LRA 337 (1893). But where the employer yields to the demand not out of any

desire to prevent the loss of existing contracts but rather to avoid the inconvenience of hiring other employees, it has been held that monies paid cannot be recovered back. *Burke v. Fay*, 128 Mo App 690, 107 SW 408 (1908). The distinction is a fine one.

53. *c/f* P. M., June 18, 1940, p. 13. "Stating he was 'sick and tired of labor racketeers,' General Sessions Judge James G. Wallace yesterday sentenced two former union officials to long prison terms. Sol Schuster, former president of the International Brotherhood of Teamsters, A. F. L., got a term of 10 to 20 years, and Simon Zarevitz, described as his lieutenant, 15 to 30 years. They were convicted of using the union for purposes of extortion."

54. 233 AD 2, 251 NYS 132 (1931).

of the defendants for criminal conspiracy was held good.

An example of a system of extortion operated through the cooperation of a trade association and a labor union is that contained in *United States v. Local Union*.⁵⁵ It there appeared that a trade association conspired with a labor union to enhance prices and to extort money from retailers. They were enjoined under the Sherman Act from further operation and they were likewise prosecuted criminally under the Sherman Act.⁵⁶

It has been held that a business agent of the union may be convicted of extortion where the evidence showed that he informed workmen that they could continue to work only if he paid a given sum weekly for a union permit.⁵⁷ The fact that the defendant had acted under a union rule to such effect was held no bar to the conviction.

Section 40. Breach of Peace and Disorderly Conduct.

Labor activities have been held illegal as constituting breach of peace or disorderly conduct in a number of cases.⁵⁸ It has been held that a temporary injunction will

⁵⁵ 291 US 293, 54 S Ct 396, 78 L Ed 804 (1934).

⁵⁶ 17 F(2d) 156 (CCA 2, 1931) cert den 283 US 837, 51 S Ct 486, 75 L Ed 1448, (1931) See also *New York Times*, May 25, 1940 p 19, giving the account of the conviction of Local 807 of the International Brotherhood of Teamsters, Chauffeurs and Stablemen and 26 of its members, under the Sherman Anti trust Act and the Anti racketeering Act. According to the prosecution, roving groups of the defendants would approach trucks from out of town as they arrived in New York and tell the drivers that they would be unable to unload without the help of a member of Local 807. "Whichever of the defendants first reached a truck belonging to a particular company became that company's 'No 1 man.' If he found that other members of the local should be hired,

he chose them the employer had little or nothing to do with selecting them."

⁵⁷ *State v. Kramer*, 31 Del 454, 115 A 8 (1921)

⁵⁸ See *State v. Dehan*, 3 Law & Labor 208 (La C C, 1921), *State v. Perry*, 196 Minn 481, 265 NW 302 (1936), *State v. Zanker*, 179 Minn 355, 229 NW 311 (1930); *State v. Cooper*, 205 Minn 333, 285 NW 903, 122 ALR 727 (1939), *People v. Kopezak*, 266 NY 565, 195 NE 202 (1935), aff'g 153 Misc 187, 274 NYS 629 (1934); *People v. Ward*, 272 NY 615, 5 NE(2d) 359 (1939), *People v. Bellows*, 281 NY 67, 22 NE(2d) 239 (1939); *People v. Nixon*, 248 NY 182, 161 NE 463 (1928); *People v. Jenkins*, 138 Misc 498, 240 NYS 444 (1930); *Michaels v. Hillman*, 111 Misc 284, 181 NYS 165 (1920); *People v. Lebensart*, 144 Misc 671, 259 NYS 309 (1932), *People ex rel. Sie-*

not be vacated on affidavits where the acts enjoined are illegal as tending to a breach of the public peace.⁵⁹ In *People on complaint of Mulhern v. Kaufman*,⁶⁰ the defendants were charged with conspiracy to commit a crime. It appeared that they were allegedly guilty of disorderly conduct in picketing carrier boys of a newspaper engaged in a labor dispute. The proceedings were dismissed upon the ground that disorderly conduct is not a crime, being neither felony nor misdemeanor, but rather a minor grade of offense in a class by itself.⁶¹

It is in connection with picketing that the sanctions of breach of the peace or disorderly conduct have been most generally applied. Picketing has been held to constitute breach of the peace or disorderly conduct in three different classes of cases:

(1) Where the picketing is noisy, violent or intimidating, or is congestive of traffic.⁶² This is the usual case and a further analysis will be made in the following section of cases wherein the given activity has been held either to constitute or not to constitute disorderly conduct.

(2) Where the picketing involves false bannerering or the making of false statements.⁶³ It has, however, been held that false bannerering or the making of false statements in connection with peaceful picketing, though probably enjoinable, does not render the defendants guilty of disorderly conduct.⁶⁴

gel v. Kaye, 165 Misc 663, 1 NYS 354 (1937). *People*, on complaint of Koester v. Rozensweig, 171 Misc 702, 13 NYS (2d) 795 (1939). *People* v. Tepperman 151 Misc 810, 273 NYS 690 (1934); *Comm* v. Silvers, 11 Pa Co Ct 481 (1892); *Comm* v. Redshaw, 12 Pa Co Ct 91 (1892); *State* v. Christie, 97 Vt 461, 123 A 849, 34 ALR 577 (1924).

59. *Michaels v. Hillman*, 111 Misc 284, 181 NYS 165 (1920). See also *Ellis v. Journeyman Barbers Int'l U.*, 194 Iowa 1179, 191 NW 111, 32 ALR 756 (1922).

60. 165 Misc 670, 1 NYS(2d) 362 (1937)

61. Citing *People v. Grogan*, 260 N Y 138, 183 NE 273 (1932).

62. See *People v. Ward*, 272 NY 615, 5 NE(2d) 369 (1939).

63. *People v. Jenkins*, 138 Misc 498, 246 NYS 444 (1930) aff'd 255 NY 637, 175 NE 348 (1931); *People v. Lebensart*, 144 Misc 671, 259 NYS 309 (1932), *People ex rel. Siegel v. Kaye*, 165 Misc 663, 1 NYS(2d) 354 (1937). See also *People v. Epstein*, 159 Misc 330, 287 NYS 429 (1936).

64. *People ex rel. Broder v. Heller*,

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(3) Where the picketing, though peaceful and though free of any false bannering or the making of any false statements, is otherwise unlawful.⁶⁵ Thus, picketing of a home has been held to render the pickets liable to the offense of disorderly conduct.⁶⁶ So, too, has picketing in connection with a non-labor dispute.⁶⁷ Picketing on property privately owned has also been held to constitute disorderly conduct,⁶⁸ as has also secondary picketing.⁶⁹

Section 41. Breach of Peace and Disorderly Conduct— What Has or Has Not Been Held to Constitute Disorderly Conduct.

The extent of disorderliness which will bring the assertedly disorderly person within the purview of the offenses of breach of the peace and disorderly conduct is necessarily a vague, uncertain, and hence undefinable quantum. The uncertainty is further enhanced by statutes, in effect in many states, which punish conduct, "tending to a breach of the peace" in addition to the common law offenses of breach of the peace and disorderly conduct. A guiding rule, however, which runs through the cases is that it constitutes a breach of the peace or conduct tending to a breach of the peace for one to disobey the move-on order of a policeman. In *People v. Galpern*,⁷⁰ the court said: "A refusal to obey such order can be justified only where the circumstances show conclusively that the police officer's di-

166 Misc 155, 2 NYS(2d) 352 (1938); See also *People ex rel. Dillon v. Schroedeman*, 133 Misc 557, 232 NYS 302 (1929).

65. c/f *People v. Berkowitz*, 132 Misc 744, 230 NYS 772 (1928); *People v. Quesada*, 154 Misc 152, 276 NYS 711 (1935).

66. *State v. Perry*, 196 Minn 481, 265 NW 302 (1936); *State v. Zanker*, 179 Minn 355, 229 NW 311 (1930); *State v. Cooper*, 205 Minn 333, 285 NW 903, 122 ALR 727 (1929). See also *People ex rel. Siegal v. Kaye*, 165 Misc 663, 1 NYS(2d) 354 (1937).

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For the legality of picketing of a residence see section 115, *infra*.

67. *People v. Kopezak*, 266 NY 565, 195 NE 202 (1935), affg 153 Misc 187, 274 NYS 629 (1934). For the legality of picketing in non-labor disputes cases, see section 134, *infra*.

68. *People*, on complaint of *Koester v. Rozensweig*, 171 Misc 702, 13 NYS(2d) 795 (1939). See section 116, *infra*.

69. *People v. Bellows*, 281 NY 67, 22 NE(2d) 236 (1939).

70. 259 NY 279, 181 NE 672, 83 ALR 785 (1932).

[1 Teller]

rection was purely arbitrary and was not calculated in any way to promote the public order." ⁷¹

An examination of the factual patterns in cases wherein the given conduct has been held to be or not to be disorderly will be made in the following cases:

*State v. Christie*⁷²—The defendant, a union man out on strike, called non-union men "scabs," "bozos" and "rats" by shouting these words in the vicinity of the non-strikers' homes. This was held to constitute the offense of disorderly conduct.

*People v. Lebensart*⁷³—It appeared here that the defendant picket admonished a customer not to enter the premises of the complainant which he was about to patronize. In addition to this admonition, the picket falsely stated to the customer that the employees of the premises were on strike. The defendant was held to have committed the offense of disorderly conduct.

*People v. Ward*⁷⁴—The evidence here indicated that four pickets obstructed the sidewalk and caused a crowd to collect and refused to move on when ordered by the police official. Two of them were arrested. They were held properly convicted of disorderly conduct tending to a breach of the peace. The Court said: "The evidence shows that this was a busy thoroughfare, and we are of the opinion that while the right to picket as established by law may not be taken away by a police official, such official may take measures to prevent the collection of a crowd, including a reasonable limitation of the number of pickets at a given location un-

71. See also *People v. Nixon*, 248 NY 182, 161 NE 463 (1928) c/f *People v. Arko*, 40 NY Crim Rep 149, 199 NYS 402 (1922) where the court said: "At times even a mere refusal to comply with the directions of a policeman, who may act in an arbitrary and unjustifiable way, does not constitute disorderly conduct. Mere disobedience of an officer is not always an offense punishable by law, any more than his command is

not always the law. There must be, upon the whole case, something more than a mere whimsical or capricious judgment on the part of the public authorities."

72. 97 Vt 461, 123 A 849, 34 ALR 577 (1924).

73. 144 Misc 671, 259 NYS 309 (1932)

74. 159 Misc 328, 287 NYS 432 (1936), aff'd 272 NY 615, 5 NE(2d) 359 (1936).

der such circumstances as appear from the evidence in this case. The Court of Appeals affirmed the conviction.⁷⁵

*People v. Nixon*⁷⁶—Pickets marched along on a sidewalk twelve feet wide, four abreast. They created no excitement or disturbance. Without warning by the police, some of them were arrested. As to other pickets, they were warned before they were arrested. Six cases were involved in the appeal to the Court of Appeals. The convictions were affirmed so far as those pickets who were warned before being arrested were concerned, but reversed with respect to those not so warned. In connection with the defendants as to whom convictions were reversed the Court said: "Men and women constantly congregate or walk upon the streets in groups quite oblivious of the fact that in some degree they are thereby causing some inconvenience to others using the street. . . . They were guilty, we may concede, of atrociously bad manners, and they discommoded some other persons lawfully using the street, to the extent that pedestrians were caused to enter the roadway. There is no evidence that the persons discommoded showed any particular annoyance. Perhaps bad manners are too usual to evoke unusual irritation or annoyance. As yet bad manners have not been made punishable by imprisonment. The question presented here is whether the defendants' conduct went beyond mere bad manners and tended toward a breach of the peace."⁷⁷

75 272 NY 615, 5 NE(2d) 359 (1939)

76 248 NY 182, 161 NE 463 (1928).

77. How many pickets are permitted to parade in the light of the offenses of disorderly conduct or breach of the peace or conduct tending to a breach of the peace? Four were held in the Nixon case (*supra*) to be lawful, in connection with the facts disclosed in that case. In the Ward case (*supra*) on the other hand,

the police were held justified in limiting the number of pickets to two. See section 125, *infra*, for an analysis of injunctions which regulate the manner of picketing and the number of pickets permitted. In *People v. Arko*, 40 NY Crim Rep 149, 199 NYS 402 (1922) it was held that pickets could not be convicted of conduct tending to a breach of the peace, where two and sometimes three pickets paraded abreast, on a sidewalk four feet wide.

Section 42. Sabotage and Criminal Syndicalism.

Emergence of the I. W. W. and the activities of radical labor groups following the World War met with immediate retaliation in America, in the form of anti-syndicalism statutes. Such laws were passed by the states of Alabama, Arizona, California, Idaho, Indiana, Iowa, Kansas, Michigan, Minnesota, Montana, Nebraska, Nevada, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington and Wyoming, and by the territories of Alaska and Hawaii.⁷⁸ Also brought into application were the older criminal anarchy statutes of New York and Pennsylvania, and the sedition law of New Jersey.⁷⁹ The constitutionality of these statutes was uniformly upheld, both by the United States Supreme Court and the various state courts.⁸⁰

78 Alabama — Code 1923, Sections 3452-3455

Arizona — Laws 1918, ch 13

California — Stats 1919, p. 281, Sec 2

Idaho — 1932 Anno Code Vol 1, Secs 17-4401 4404

Indiana — See Section 10-1301, Burns Stats 1933 (Anti-Red Flag Law).

Iowa — 1935 Code, Secs 12906-12909

Kansas — 1935 Gen Stats Anno, Secs 21-301-21-304

Michigan — See Section 17115-48 Comp Laws, 1935 Supp (Anti-Red Flag Law)

Minnesota — Mason's Minnesota Stats 1927, Secs 10057-10060

Montana — Rev Code of 1935, Secs 10740-10744 See also Sec 10745 (Anti-Red Flag Law)

Nebraska — Comp Stats 1929, ch 28, Secs 28-815, 587 See also Sec 28-1104 (Anti-Red Flag Law).

Nevada — Comp Laws 1929, Secs 10560-10563

Ohio — Gen Code Anno 1937, Sec 13421-23.

Oklahoma — 1931 Stats Ch 15, Art 87, Sec 2573. See also Ibid Sec 2575

(Anti-Red Flag Law).

Oregon — 1930 Ann Code Secs 14-3, 110-113

So Dakota — Comp Laws 1929, Sec 3644

Utah — Rev Stats 1933, Sec 103-54-3

Washington — Remington Rev Stats Anno Secs 2562-2568

Wyoming — Acts of 1919, Ch 76

Alaska — Acts of 1919, Ch 6

Hawaii — Rev Laws of 1935, Secs 5601-5604

See Dowell, A History of Criminal Syndicalism Legislation in the United States (1939)

79 New Jersey — PL 1902, pp 405, 406, repealed L 1928, Ch 247, p. 441

New York — McKinny's Code, Penal Law, Secs 160, 161

Pennsylvania — See Title 18, Chap 1, Sec 63 (Anti-Red Flag Law)

80. Fiske v Kansas, 274 US 380, 47 S Ct 665, 71 L Ed 1108 (1927).
Whitney v California, 274 US 357, 47 S Ct 641, 71 L Ed 1095 (1927);
Stromberg v California, 283 US 359, 51 S Ct 532 75 L Ed 1117 (1931);
State v Mollen, 140 Minn 112, 167 NW 345 (1918), **People v. Lloyd**, 304 Ill 23, 136 NE 505 (1922), **State v.**

It should be noted that a revolutionary strain, which characterized the thoughts of early American leaders, has

Steelik, 187 Cal 361, 203 P 78 (1921); State v. Hennessey, 114 Wash 351, 195 P 211 (1921); State v. Dingman, 37 Ida 253, 219 P 760 (1923); State v. Laundry, 103 Or 443, 204 P 958, 206 P 290 (1922); People v. Ruthenberg, 229 Mich 315, 201 NW 358 (1924); Berg v State, 29 Okla Crim 112, 233 P 497 (1925); Commonwealth v. Widovich, 295 Pa 311, 145 A 295 (1920); State v. Quinlan, 86 NJL 120, 91 A 111 (1914), aff'd 87 NJL 333, 93 A 1086 (1915); Gitlow v New York, 234 N Y 132, 136 NE 317 (1922) aff'd 268 US 652, 45 S Ct 625, 69 L Ed 1138 (1925).

In the following cases the statutes were construed in connection with specific facts

California.—Re McDermott, 180 Cal 783 183 P 347 (1919); People v. Malley, 49 Cal App 597, 194 P 54 (1920); Whitney v. Alameda County, 182 Cal 114, 187 P 12 (1920); Re Wood, 194 Cal 49, 227 P 808 (1924); People v. Steelik, 187 Cal 361, 203 P 78 (1921); People v. Wieler, 55 Cal App 687, 204 P 410 (1921); People v. McClennegen, 195 Cal 445, 234 P 91 (1925); People v. Wagner, 65 Cal App 704, 225 P 464 (1924); People v. Thompson, 68 Cal App 487, 229 P 896 (1924); People v. Taylor, 187 Cal 378, 203 P 85 (1921); People v. Cox, 66 Cal App 287, 226 P 14 (1924); Re Campbell, 64 Cal App 300, 221 P 952 (1923); People v. Wright, 66 Cal App 782, 226 P 952 (1924); People v. Ware, 67 Cal App 81, 226 P 956 (1924); People v. Flanagan, 65 Cal App 268, 223 P 1014 (1924); People v. Johnson, 66 Cal App 343, 226 P 634 (1924); People v. Bailey, 66 Cal App 1, 225 P 752 (1924); People v. Thurman, 62 Cal App 147, 216 P 394 (1923); People

v. Thornton, 63 Cal App 724, 219 P 1020 (1923); People v. Leonard, 66 Cal App 140, 225 P 461 (1924); People v. Lesse, 52 Cal App 280, 199 P 46 (1921); People v. Roe, 56 Cal App 690, 209 P 381 (1922); People v. Casdorf, 60 Cal App 106, 212 P 237 (1922); People v. Whitney, 57 Cal App 449, 207 P 698 (1922); People v. Welton, 190 Cal 236, 211 P 802 (1922); People v. Stewart, 68 Cal App 621, 230 P 221 (1924); People v. Johansen, 60 Cal App 343, 226 P 634 (1924); People v. La Rue, 62 Cal App 276, 216 P 627 (1923); People v. Erickson, 66 Cal App 307, 226 P 637 (1924); People v. Powell, 71 Cal App 200, 236 P 311 (1923)

Idaho.—State v. Dingman, 37 Idaho, 253, 219 P 760 (1923); Re Moore, 38 Idaho 506, 224 P 662 (1924). In the Moore case it was contended that striking was sabotage within the meaning of the state criminal syndicalism act, but the court held to the contrary.

Iowa.—State v. Tonn, 195 Iowa 94, 191 NW 530 (1923).

Kansas.—Re Danton, 108 Kan 451, 195 P 981 (1921); State v. Breen, 110 Kan 817, 205 P 632 (1922). State ex rel. Hopkins v. Industrial Workers, 113 Kan 347, 214 P 617 (1923);

Michigan.—People v. Ruthenberg, 229 Mich 315, 201 NW 358 (1925).

Minnesota.—State v. Workers' Socialist Pub Co. 150 Minn 406, 185 NW 931 (1921); State v. Moilen, 140 Minn 112, 167 NW 345, 1 ALR 331 (1918).

Nevada.—Re Moriarty, 44 Nev 164, 191 P 360 (1920).

New Jersey.—State v. Quinlan, 86 NJL 120, 91 A 111 (1914) aff'd 87 NJL 333, 93 A 1086 (1915); State v. Boyd, 86 NJL 75, 91 A 586 (1914).

borne little fruit in the direction of our law. The Declaration of Independence was essentially a revolutionary document. The second President of the United States openly stated that "The right of a nation to kill a tyrant in cases of necessity can no more be doubted than that to hang a robber or kill a flea,"⁸¹ while the third President, Thomas Jefferson, stated blandly: "I hold a little rebellion now and then is a good thing and as necessary in the political world as storms in the physical."⁸² Abraham Lincoln's belief in the inherent right of the people to destroy the existing government has become a commonplace. Nevertheless we have definitely adopted the theory that he who advocates the overthrow of existing government must run the gamut of the criminal laws.⁸³

Section 43. Riot and Inciting to Riot.

At common law, riot was the concert of three or more in executing an enterprise, whether lawful or unlawful, in a manner so violent as to arouse the fear of people. The offense of inciting to riot was found in its tendency to provoke a breach of peace. Statutes in the several states have codified the common law definitions of riot and inciting to riot, but in some states the concert of two or more is sufficient to constitute the offenses.

New York.—*Gitlow v. New York*, 234 NY 132, 136 NE 317 (1922) aff'd 268 US 652, 45 S Ct 625, 69 L Ed 1138 (1925)

Oregon.—*State v. Laundry*, 103 Or 443, 204 P 958, rehearing den 103 Or 503, 206 P 290 (1922)

Washington.—*State v. Lowery*, 104 Wash 520, 177 P 355 (1918); *State v. Hennessey*, 114 Wash 351, 195 P 211 (1921); *State v. Hastings*, 115 Wash 19, 190 P 13 (1921); *State v. Hemhelter*, 115 Wash 208, 190 P 581 (1921); *State v. Gibson*, 116 Wash 512, 197 P 611 (1921); *State v. Pettilla*, 116 Wash 589, 200 P 332 (1921); *State v. Cantwell*, 119 Wash 665, 206 P 362 (1922); *State v. Kowalchuk*, 116 Wash 592, 200 P

333 (1921), *State ex rel. Lindsey v. Grady*, 114 Wash 692, 195 P 1049 (1921), *State v. McLennon*, 116 Wash 612, 200 P 319 (1921).

81. Works of John Adams. Edited by C. F. Adams, p. 130.

82. Writings of Jefferson, by Foreman, pp 296 297

83. See *People v. Gitlow*, 268 US 652, 45 S Ct 625, 69 L ed 1138 (1923). A general strike which is part of a plan to overthrow existing government is illegal *People v. Lloyd*, 304 Ill 25, 136 NE 505 (1922); *Rex v. Russel*, 10 BRC 836, 51 DLR 1 (Manitoba, 1920). See also *People v. Burman*, 154 Mich 150, 117 NW 589 (1908).

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Labor activities have come within the purview of the offenses of riot or inciting thereto, in a number of cases.⁸⁴ The issue which divides labor and capital in connection with these offenses revolves around the question as to whether employer or employee is responsible for the conditions which bring about the riotous conduct. Labor unions complain that the use by employers of armed guards, private detective agencies, labor spies and strike-breaking agencies have been greater contributing factors than lawlessness on the part of workingmen. It is also contended that provocative and illegal actions of local executive authorities have had much to do with riots asserted to have been incited by striking workingmen. In *People v. Yuen*,⁸⁵ the Court held inadmissible, evidence that deputies of the sheriff destroyed a news reporter's camera and films containing negatives showing illegal methods employed by the sheriff and his deputies. The Court further held that if the sheriff made any unlawful attack on the defendant pickets it was the duty of the citizens to yield and to petition the Courts for redress.⁸⁶

Employers, on the other hand, have contended that there is generally no such thing as a peaceful strike but that a strike is necessarily coupled in many instances with violence and intimidation of non-strikers. It is further asserted that picket lines are utilized for the purpose of preventing employees, hired by the employer to take the place of strikers, from entering the plant. The larger picture, to continue the employer's point of view, involves the employees' conception of a strike as the cessation of working without loss of employment. Hence any act on the part of an employer designed to continue his plant in operation is met with unlawful resistance by employees whose concep-

84. See *People v. Bradley*, 137 Cal App 225, 30 P(2d) 438 (1934); *People v. Yuen*, 98 P(2d) 438 (Cal, 1939); *Bolin v State*, 193 Ind 302, 139 NE 659 (1923); *People v Brown*, 193 AD 203, 184 NYS 165 (1920); *Brous v. Imperial Assur. Co* 130 Misc 450, 224 NYS 136 (1927) aff'd

223 AD 713, 227 NYS 777 (1928). *State v Hoffman*, 199 NC 328, 154 SE 314 (1930). *Sekat v State*, 218 Wis 91, 200 NW 246 (1935)

85. 89 P(2d) 438 (Cal, 1939).

86. See also *People v. Brown*, 193 AD 203, 184 NYS 165 (1920).

tions about rights in their job are at variance with the institution of private property as that institution presently exists.

The implications of the contending viewpoints surrounding the causes of violence in connection with labor disputes have been revealed in the sit-down strike and in cases which have arisen under the National Labor Relations Act. Further elaboration of the background against which industrial unrest must be understood will be found in subsequent sections discussing the sit-down strike,⁸⁷ and the effect of employees' wrongdoing upon their right to re-employment under the National Labor Relations Act.⁸⁸

Section 44. Unemployment Insurance Benefits.

A law which would deny to employees whose employment has ceased in consequence of a labor dispute, the right to unemployment insurance benefits, is not a legal sanction as these words are generally understood. But such a law is nevertheless as real a legal sanction as any other, being in effect a denial to employees involved in a labor dispute of benefits generally accorded to others. Section 5 of the Social Security Board Draft Bill, which has been copied substantially by 41 of the 51 states and territories having unemployment insurance laws, provides as follows: "An individual shall be disqualified for benefits. . . . (d) For any week with respect to which the commissioner finds that his total or partial unemployment is due to a stoppage of work which exists because of a labor dispute at the factory, establishment or other premises at which he is or was last employed: Provided, That this sub-section shall not apply if it is shown to the satisfaction of the commissioner that—

(1) He is not participating in or financing or directly interested in the labor dispute which caused the stoppage of work; and

(2) He does not belong to a grade or class of workers of which, immediately before commencement of the stoppage,

87. See section 106, *infra*.

88. See section 319, *infra*.

there were members, employed at the premises at which the stoppage occurs, any of whom are participating in or financing or directly interested in the dispute:

Provided, That if in any case separate branches of work which are commonly conducted as separate businesses in separate premises, are conducted in separate departments of the same premises, each such department shall, for the purpose of this subsection, be deemed to be a separate factory, establishment, or other premises."

It will be seen that the bill makes no distinction between a labor dispute precipitated by a strike and one occasioned by a lockout. Again, no consideration is given to the various causes of labor disputes. In some jurisdictions the provisions governing the right to unemployment insurance benefits by employees engaged in labor disputes are not as drastic as those contained in the Social Security Board Draft Bill. Alabama, California, Delaware, District of Columbia, Kentucky, New York, Ohio, Pennsylvania, Utah and Wisconsin are among the states which establish a maximum period of disqualification, after which unemployment insurance benefits are paid to employees though involved in a labor dispute. In other jurisdictions, disqualification results only where the labor dispute was precipitated by a strike (California, Colorado, Kentucky, Ohio, Pennsylvania, Utah, District of Columbia), while in the states of Arizona, Montana and Utah, the provisions of the Statute are aimed at ascertaining whether the employees or the employer were responsible for precipitating the dispute. The contention has been made that all provisions disqualifying employees from receiving unemployment insurance benefits where their work has ceased as a result of a labor dispute should be repealed.⁸⁹ There is little likelihood, however, of their repeal. Employers subject to the unemployment insurance tax argue that the moneys which they pay in the form of taxation should not be disbursed

⁸⁹ Fierst & Spector, *Unemployment Compensation in Labor Disputes* (1940), 49 *Yale L Jour* 461, 468-491. See also Schindler, *Collective Bargaining & Unemployment Legislation* (1938) 38 *Col L Rev* 858.

among employees engaged in a labor dispute as a form of strike benefit. Again, it is asserted that the state ought to be neutral in connection with labor controversies. Finally, it is argued that unemployment is voluntary and not involuntary where work ceases in consequence of a labor dispute.

The entire subject is in its infancy. We may, however, hope for further clarification of the meaning of the term "labor dispute" in connection with unemployment insurance legislation. The increasing number of cases involving contested rights to unemployment insurance benefits have revealed unworkable generalities in present legislation and the need for more careful terminology in the light of the many novel situations.⁹⁰ The general subject of unemployment insurance legislation is not within the scope of this work.

Section 45. Interference with the Employment Relationship.

Prohibitions against enticement of servants contained in the English Statutes of Labourers provided for the common law a basis for the tort of third party interference with contractual relations.⁹¹ Early English cases held actionable, intrusions by third parties upon business relations where

⁹⁰ See Fierst & Spector, Unemployment Compensation in Labor Disputes (1940), 49 Yale L Jour 461, 469-489.

⁹¹ See Sayre, Inducing Breach of Contract (1923) 36 Harv L Rev 663, 665-66. Anti-enticement statutes providing either for criminal penalty or private suit by the aggrieved employer or both are presently in effect in the following states: Alabama Code (1928), Secs 3985-3987, Ark Stats (1919, Kirby & Castle), Sec 5960, Fla Gen Laws (1927), Secs 7160, 7167; Ga Penal Code (1926), Secs 123, 125; Ky Stats (1930, Carroll), Sec 2601; La Crim Stats (1929, Marr), Sec 57; Miss Code (1930), Sec 900; NC Code (1931), Secs 4469, 4470; SC Code (1932), Sec 1314;

Tenn Code (1932), Sec 7811. In some cases it is held that the third party is liable to the master for enticing the servant even though the servant has theretofore broken the contract. *Tarpley v State* 79 Ala 271 (1885); *Morris v. Neville*, 11 Lea 271 (Tenn 1881). But contrary holdings are much more numerous. *Tucker v State*, 86 Ark 436, 111 SW 275 (1908), *Park v. Depriest*, 138 Ark 86, 210 SW 777 (1919), *Broughton v. State*, 114 Ga 34, 39 SE 866 (1901); *McAllister v. State*, 122 Ga 744, 50 SE 921 (1905); *Evans v. State*, 121 Miss 252, 83 S 167 (1919); *Thompson v. Box*, 147 Miss 1, 112 S 597 (1927); *Waldrup v. State*, 154 Miss 646, 122 S 771 (1929).

the intrusions were tortious, as where they were fraudulent, defamatory or coercive.⁹² In *Lumley v. Gye*,⁹³ the existence of "malice" was held sufficient to lay the foundation for a cause of action for interference with a term contract of employment.⁹⁴ Later development of the law extended the actionable character of third party interference with contractual relationships to at-will contracts⁹⁵ and to contracts other than employment agreements,⁹⁶ and the existence of malice was held unnecessary, the Courts holding that lack of justification was sufficient even though no malice was present.⁹⁷ Against this background labor unions were dealt with by the common law.

92 *Garret v. Taylor*, Cro Jac 567 (1621), *Tarleton v. McGawley*, Peakes NP 205 (1793), *Keeble v. Hickeringill*, 11 East 574 (1706)

93 2 Ell & Bl 216 (1853)

94. "The significance of *Lumley v. Gye* lies in its extension of the rule of liability to non-tortious methods of inducement." Rest. Torts (1939) Sec 766b

95 See *Temperton v. Russell* [1893] 1 QBD 715, 728, *United States Fidelity & Guaranty Co. v. Millonas*, 206 Ala 147, 89 S 732 (1921), *Johnston Harvester Co. v. Meinhardt*, 9 Abb NC 393 (NY, 1880). But see *Smith, Crucial Issues in Labor Litigation* (1907) 20 Harv L Rev 253, 261-267, *Savre, Inducing Breach of Contract* (1923) 36 Harv L Rev 663, 701

96. See *Temperton v. Russell* [1893] 1 QBD 715. While the general rule holds that the tort of inducing the breach of contract applies to all contracts (*Burdick on Torts*, 4th Ed p 472) it is held in some cases that, in the absence of fraud, defamation or coercion, only employment contracts are thus protected. *Ersawell v. Ford*, 208 Ala 101, 94 S 67 (1922); *McCluskey v. Steele*, 18 Ala App 311, 88 S 367 (1920);

Boyson v. Thorn, 98 Cal 578, 33 P 492 (1893), *Jackson v. Morgan*, 49 Ind App 376, 94 NE 1021 (1911), *Chambers & Marshall v. Baldwin* 91 Ky 121, 15 SW 57 (1891), *Boulter v. Macaulay*, 91 Ky 135, 15 SW 60 (1891), *Glencoe L. & G. Co. v. Hudson Bros. Co.*, 138 Mo 439, 40 SW 93 (1897), *Swain v. Johnson*, 151 NC 93, 65 SF 619 (1900), *Sleeper v. Baker*, 22 ND 386, 134 NW 716, 39 LRA(NS) 864, Ann Cas 1914B, 1189 (1911), *Banks v. Eastern Ry. & Lumber Co.*, 46 Wash 610 90 P 1048 (1907), *Jones v. Leslie*, 61 Wash 107, 112 P 81 (1910). In England, the rule applies not only to personal contracts but to contracts generally. *Temperton v. Russell* [1893], 1 QB 715, 62 LJQB 412

The fact that the agreement allegedly interfered with was legally unenforceable between the parties does not affect third parties' liability. *Aalto Co. v. Kinney*, 105 NJL 345, 144 A 715 (1929), *Rice v. Manley*, 66 NY 82 (1876).

97. *South Wales Miners' Federation v. Glamorgan Coal Co.* [1905] AC 239, 255. "The real basis of the rule appears to be, not the malicious motive of the defendant, but the result achieved, to wit. the inexcusable invasion of the existing contract

Third party interference with the relationship of employer and employee must be distinguished on the one hand from the case where the relationship has not yet been entered into, and on the other hand from the case where that relationship is bound by more than an at-will contract of employment. Unless these three situations are segregated for the purpose of legal analysis, the present labor law, which is considered in the books under the headings of "Interference with employment relationships" and "inducing the breach of contract" cannot be stated with any degree of accuracy nor adequately comprehended, nor, of course, subjected to reasonable criticism.

Different views may be taken in connection with these three situations. According to one view, the substantive rights attached to one situation may be different from that attached to the others. An employee's right to seek employment would, under such a view, be considered an aspect of the general right to a free and open market, an analysis of which right has heretofore been undertaken.⁹⁸ An at-will employment relationship without more would find its source of protection partly in the law of contracts, and partly in that branch of the law of torts which forbids intrusion upon a relationship which, but for such intrusion, would have continued. The substantive right, in other words, would be a right qualitatively different and more valuable than the right which has been termed generally the right to a free and open market. The third situation, i. e., the contract of employment which goes further than the ordinary at-will contract, as where it contains provisions which labor has, happily for itself, succeeded in covering with the shameful words "yellow-dog," or where the contract is a term employment agreement, would involve the highest substantive right, a right differing from that invoked either by the workingman looking for a job, or the same workingman employed under an at-will contract of employment. This, then, is the first view. A discussion of

right of the plaintiff" Ryther v. ney & Son, 227 NY 418, 125 NE 817
 Lefferts, 232 AD 552, 250 NYS 699 (1920)
 (1931). See also Lamb v. S Chey- 98. See sections 11-23, supra.

the legal implications of this view will be deferred to a statement of the second point of view.

Under this second viewpoint, the substantive right attached to the three situations considered is a common one. The difference in legal holdings is thus found not in a differing substantive law, but rather in the contrasting bases of justification. A third person may, by reason of given circumstances, be justified in intruding upon and interfering with one of the situations, when the same facts or circumstances may be insufficient to justify like action in disregard of the other situations.

It is difficult if not impossible to ascertain which of the two viewpoints the cases espouse. In 1927 Oakes, in his work on *Organized Labor and Industrial Conflicts*,⁹⁹ stated that the problem was one which the courts made no general effort to resolve. An examination of the American cases, both those decided before the time Oakes wrote, and those which have since been decided, has yielded no clarification of the subject. In part this is due to the reluctance of the courts to recognize in clear terms the existence of the general right to a free and open market. In greater part, perhaps, it is due to the fact that most of the litigation concerned with intrusion upon the employment relationship has involved the yellow-dog contract, thereby leading the courts to discuss the problem solely in terms of the employer's rights in the employee's observance of the employment contract and in third parties' duty to refrain from inducing the breach of the contract.

The Restatement of Torts has taken the position that the substantive right involved in all three situations is a single one, and that the variation in legal doctrine is to be found in the different issues governing justification. "The liability for inducing breach of contract," it is stated,¹ "is now regarded as but one instance, rather than the exclusive limit, of protection against unjustified interference in business relations. The added element of a definite contract may be a basis for greater protection; but some protection is ap-

⁹⁹ Section 257.

¹ Rest., Torts (1939) Sec 766b.

propriate against unjustified interference with reasonable expectancies of commercial relations even when an existing contract is lacking. The unjustifiable character of the actor's conduct and the harm caused thereby may be equally clear in both cases. The differentiation between them relates primarily to the scope of the privileges, or the kind and amount of interference that is justifiable in view of the differences in the facts." It may well be doubted whether the law as actually worked out in judicial decision supports the view of the Restatement in the general manner in which the view is stated. However, the Restatement is probably justified in taking a clear position in an instance where the decisions lean to confusion.²

Section 46. Interference with the Employment Relationship—Right to Look for Job and Rights in At-Will Employment Contract Distinguished.

Nevertheless it is well to point out that in several details, the cases distinguish, apparently in terms of substantive

2. See Chapin, on Torts, p 425, where the writer says "Strictly speaking, the term 'contractual rights' means rights secured by existing contracts but in its larger aspect, it may include rights to contract." Also in point are the words of Holmes, J., dissenting in *May v. Wood*, 172 Mass 11, 51 NE 191 (1898) "The next point is, whether the distinction taken for the defendants between the claim for inducing persons to break contracts already entered into with the plaintiff and that for inducing persons not to enter into contracts with the plaintiff can be sustained and whether the latter claim is maintainable in law. I do not think that distinction can prevail. There was the same wrongful intent in both cases, wrongful because malicious. There was the same kind of injury to the plaintiff. It seems rather a fine distinction to say that where a defendant mal-

iciously induces a person not to carry out a contract already made with the plaintiff and so injures the plaintiff, it is actionable, but where he injures the plaintiff by maliciously preventing a person from entering into a contract with the plaintiff, which he would otherwise have entered into, it is not actionable." See also, *Carpenter*, *Interference with Contract Relations* (1928) 41 *Harv L Rev* 728, 744-745 "It is submitted that the authorities do warrant the conclusion that there is no distinction taken between the two types of contracts (term contracts and at-will contracts) as to the means of invasion. Mere persuasion, although it involves no method in itself tortious is sufficient to make an invasion actionable where there is no justification. An important distinction between the two is established, however, when it comes to justification."

rights, between the workingman's right to seek a job in a free and open market, and the rights and liabilities of an employee employed under an at-will contract of employment.³ That an at-will contract of employment has special legal consequences and imposes definite liabilities is evidenced by the rule that an employee may be enjoined from violation of a restrictive covenant contained in a contract of employment, even though the contract is one at will.⁴ Coming more to the point, it is the settled law that non-union employees discharged by reason of the execution of a closed shop contract have a right of action against the union (and likewise against the employer, if the logic of the situation controls, but in few cases has the employer been joined as a party defendant) for interfering with his right of employment.⁵ Where the closed shop contract is legal, no right of action exists, to be sure, but this is because there is justification and not for the lack of any substantive right.⁶ In general, one employed under an at-will contract of employment may sue to enjoin third party interference.⁷ It has even been held

3 This, as has been said (section 23, *supra*) and will hereafter be emphasized (this section), is due in part to failure by the judiciary clearly to recognize the workingman's right to a free and open market, and in part (see section 12, *supra*) to concentration on employers' rights when employees complain of wrongs

4. *Sherman v. Pfefferkorn*, 241 Mass 468, 135 NE 568 (1922); *Walker Coal & Ice Co. v. Westerman*, 273 Mass 564, 174 NE 199 (1931). In some cases such a covenant is valid if a period of notice of termination is agreed upon, while in others it is valid if there is employment under the agreement for "some time." See *Williston on Contracts* (Rev. Ed.) sec. 1643. Note, the Enforceability of a Promise not to Compete after an Employment at Will (1929), 29 Col L 112

Rev 347

5 See section 12, *supra*

6. The legality of the closed shop is considered in several sections of this work. See sections 97-101, *infra*, dealing with the strike for the closed shop, and the many points of view in connection with the closed shop. Section 114, *infra*, states the legality of picketing and section 149, *infra*, of boycotting for the same purpose. Section 170 *infra* takes up the validity of collective bargaining agreements which provide for a closed shop.

7. *Truax v. Raich*, 239 U.S. 33, 36 S. Ct. 7, 60 L. Ed. 131 (1915). See also *Blumenthal v. Shaw*, 77 F. 954, 23 CCA 590, 39 US App 490 (CCA 3, 1897); *London Guarantee & Acc. Co. v. Horn*, 101 Ill. App. 355, 206 Ill. 403, 69 NE 526, 99 Am St Rep 185 (1903); *Chipley v. Atkinson*, 23 Fla

that a labor union may be enjoined from persuading at-will employed workingmen to join the union and engage in labor activity, because such conduct seeks unlawfully to induce a breach of contract.⁸

In Massachusetts an employee discharged because he is not a member of a union contracting for a closed shop has a right of action against the union, but apparently if he is discharged before execution of the closed shop contract and the contract thereafter executed, he has no cause of action.⁹ The Massachusetts view, to which most states tacitly adhere, thus recognizes a distinction between the right of the workingman looking for employment and the right of the at-will employee. This is not to say that there is any logical basis for the rule which, on the one hand, permits a discharged employee to seek redress against the consequences of the closed shop agreement and, on the other hand, denies to a workingman looking for employment a like remedy. Several reasons probably explain the paucity of cases involving a workingman's, as distinguished from an employee's power, to attack a closed shop agreement as interfering with his legal rights, but none of the reasons would seem to be persuasive. Partly the lack might be due to the fact that, with the exception of the fairly recent New York case of *Williams v. Quill*,¹⁰ closed shop

206, 1 S 934, 11 Am St Rep 367 (1887), *Lucke v Clothing Cutters* 77 Md 396, 26 A 505, 19 LRA 408, 39 Am St Rep 421 (1893), *Perkins v Pendleton*, 90 Me 166 38 A 96, 60 Am St Rep 727 (1897), *Brennan v United Hatters*, 73 NJL 729, 65 A 165, 9 LRA(NS) 254, 118 Am St Rep 727, 9 Ann Cas 698 (1906), *Moran v Dunphy*, 177 Mass 185, 59 NE 125, 52 LRA 115, 83 Am St Rep 289 (1901), *Berry v. Donovan*, 188 Mass 353, 74 NE 603, 5 LRA(NS) 899, 108 Am St Rep 499 (1905)

8. *Jonas Glass Co. v. Glass Bottle Blowers Assn.* 77 NJ Eq 219 79 A 262 (1910), *Haskins v. Royster*, 70 NC 601 (1874). See also *Thacker*

Coal Co v Burke, 59 W Va 253, 53 SE 161 (1906). The general rule, however, assumes the contrary. See *Vail Ballou Press, Inc. v Casey*, 125 Misc 689 212 NYS 113 (1925) c/f *Lambert v Georgia Power Co.* 181 Ga 621, 183 NE 874 (1936) holding a combination of employers to procure the discharge of at-will employees non-actionable, and see also cases at sections 471-472, *infra*, holding combinations to blacklist legally unassailable at common law

9 See sections 97, 170, *infra*

10. 277 NY 1, 12 NF(2d) 547 (1938), appeal dismissed 303 US 621, 58 S Ct 650 82 L Ed 1085 (1938)

agreements have never been held valid where they affect an entire industry in a given community. The implication of this point is that a workingman looking for a job cannot show that his right to a free and open market has been impaired to the extent that he cannot find employment, since the closed shop agreement does not affect the entire industry. But this argument is a straw man because the employee's right to a free and open market is a right which is entitled to complete freedom and not simply partial freedom. Secondary boycott cases, holding that a third party may not be said to be coerced where an alternative is left open to him reflect a similar fallacy.¹¹ A second reason might be that a workingman, looking for a job, could not succeed in enjoining further performance of the provisions of a closed shop agreement because he would be unable to show that employers would have employed him but for the closed shop agreement. Here, too, has been set up a straw man because the argument would constitute a misapprehension of the employee's right to a free and open market. That right is not one which depends for its vindication upon willing employers, but is rather one which exists for the purpose of enabling the employee to secure willing employers or to persuade them into willingness to employ him. It is probably true that the judiciary has not thought the question through, because the problem is one of those vanguards in labor law, the implications of which are as yet but dimly perceived.¹² As a matter of principle, the right of a discharged employee to secure redress against

11. See section 150, *infra*

12. "If, after obtaining, or seeking to obtain, employment in a shop, the master of that shop should be subjected to annoyances and molestation, instigated by the proprietors of other printing shops, who combine to compel, by such molestation and annoyance, this one master printer, against his will and wish, to exclude the operative from employment, this operative, in my judgment, would have a right to an ac-

tion at law for damages, and would have a right to an injunction if his case presented the other ordinary conditions upon which injunctions issue. But the common law courts have not had time to speak distinctly on this subject as yet, and it is necessary to be cautious in dealing with a subject in which both courts of law and courts of equity as yet are feeling their way." *Jersey City Printing Co. v. Cassidy*, 63 NJ Eq 759, 53 A 230 (1902).

the consequences of a closed shop agreement should be equally as great as but no greater than the similar right of a workingman looking for employment. In both cases, the right is dependent upon the validity, in the light of public policy, of the closed shop agreement.

In general, the present law governing third party interference with pre-contractual relationships is different from that governing like interference with contractual relationships. Third party intrusions upon pre-contractual relationships is actionable only where fraud or unfair competition accompanies the intrusion.¹³ In *Union Car Advertising Co. Inc. v. Collier*,¹⁴ the New York Court of Appeals reversed a judgment entered upon a verdict for the plaintiff in an action to recover damages for the defendants' interference with a contract which the plaintiff allegedly would have made with a third party but for the defendants' interference, holding that the evidence of actionable interference was insufficient, and that a new trial should be had. The decision is a leading case upon the subject. The court said: "To entitle the plaintiff to recover in an action like this, it must prove that it would have procured and received the contract but for the wrongful and illegal interference of the defendants. That the defendants interfered there is no question. Of course they did. They were competitors, and they interfered successfully to themselves. They fought the plaintiff at every point, no doubt bringing much influence to bear in their favor. The interference of a competitor creates no cause of action. The thing the law looks for and seeks to redress when found is fraud, deceit, false charges made against the competitor. . . . The courts rightfully extended the arm of the law to reach one who deliberately interfered with an executed contract (*Lumley v. Gye*, 2 E. & B. 216), since which time they have gone a

13. *Lewis v. Bloede*, 202 F 7 (CCA 4, 1912); *Skene v. Carayannis*, 103 Conn 708, 131 A 487 (1926); *Debnam v. Simonson*, 124 Md 354, 92 A 782 (1898); *May v. Wood*, 172 Mass 11, 51 NE 191 (1898); *Morgan v.*

Andrews, 107 Mich 33, 64 NW 869 (1895); *Union Car Advertising Co. Inc v. Collier*, 263 NY 386, 189 NE 463 (1934); 14. 263 NY 386, 189 NE 463 (1934).

step further and mulcted in damages him who does the same thing to one who would have received such a contract but for the illegal interference."

Section 47. Interference with the Employment Relationship—Right in At-Will Employment and Employment Contract Distinguished.

It may also well be doubted whether the substantive right to non-interference by third parties which results from a contract of employment is the same as that which results from the ordinary at-will employment.¹⁵ With limited exceptions, it is the general rule that a tort is committed by interfering with the performance of term contracts.¹⁶ An outstanding exception to the rule holding actionable third party interference with contracts which are not at-will relationships are contracts to marry.¹⁷ A group of theatrical associations were held in the English case of *Brimelow v. Casson*¹⁸ to be possessed of justification to induce theatre proprietors either to break contracts with a theatrical manager for the use of their theatres, or to refuse to enter into

15. The term "contract of employment" as used in the text is meant to include both a term contract and the yellow-dog contract and these two forms of contractual arrangements are distinguished from the at-will employment relationship.

16. *Westinghouse Elec. & Mfg Co v. Diamond State Fiber Co*, 268 F 121 (DCD Del, 1920), *Sperry & Hutchinson Co v Pommer* 199 F 309 (DCND NY, 1912), *Automobile Ins Co v Guaranty Security Corp* 240 F 222 (DCSD NY, 1917), *Fed Sugar Refining Co v. U. S. Sugar Equalization Board*, 268 F 575 (DC SD NY, 1920); *Hogue v. Sparks*, 146 Ark 174, 225 SW 291 (1920); *Employing Printers Club v Dr Blosser Co.*, 122 Ga 509, 50 SE 353 (1905); *Doremus v Hennessy*, 176 Ill 608, 52 NE 924, 54 NE 524, 43 LRA 707, 68 Am St Rep 203 (1898); *Nulty v.*

Hart Bradshaw Lumber & Grain Co 116 Kan 446, 227 P 254 (1921), *Friedberg, Inc v McClary*, 173 Ky 579, 191 SW 300 (1917); *Tracey v Osborne*, 226 Mass 25, 114 NF 959 (1917), *Gonzales v Kentucky Derby Co.*, 197 AD 277, 189 NYS 783 (1921), *Bowen v Speer*, 166 SW 1183 (Tex Civ App, 1914), *Singer Sewing Machine Co v Land*, 186 Wis 530, 203 NW 399 (1925), *Thacker Coal & Coke Co v Burke*, 59 W Va 253, 53 SE 161 (1906).

17. *Overhultz v Row*, 152 La 9, 92 S 716 (1922); *Homan v Hall*, 102 Neb 70, 165 NW 881 (1917), *Guida v Poutrelli*, 114 Misc 181, 186 NYS 147 (1921); *Stiffler v Boehm*, 124 Misc 55, 206 NYS 187 (1924). See also *Fredenburg v Fredenburg*, 159 Misc 525, 288 NYS 377 (1936).

18. [1924] LR 1 Ch 302.

contracts with him, where the associations acted to prevent the theatrical manager from further failure to pay chorus girls a living wage as a result of which they were obliged to resort to misconduct and prostitution to supplement their earnings.¹⁹ The generality holding third parties liable for inducing the breach of a contract which is something more than an at-will arrangement has been held true in cases involving labor disputes. Strikes which cause a breach of contract have been held illegal under two sets of circumstances. In the first, the strike is called in violation of term contracts of employment entered into by the employer with his employees individually, and in such case the strike is almost universally held illegal both because constituting a breach of agreement and because the combination evidences a reciprocal inducement to the breach of the agreement.²⁰ In the second, the strike is called against an employer under contract with a third party. Here, there is a split of authority, some courts holding the strike illegal because inducing the breach of a contract²¹ while other courts hold it legal either upon the theory of justification or the viewpoint that the strike does not have as its purpose inducing the breach of any contract.²² Picketing and boycotting have similarly been enjoined, where the effect thereof is to induce if not to coerce the breach of a contract,²³ but in New York the rule is different²⁴ and generally, the new view which appears to be emerging, that picketing is the exercise of the right to free speech,²⁵ would affect the present law.

The bona fide exercise of the right of competition, though insufficient to justify inducing the breach of a term contract of employment,²⁶ is sufficient to render non-actionable the

19. See also *Legus v. Marcotte*, 129 Ill. App. 67 (1906); *McAnn v. Wolff*, 28 Mo. App. 417 (1888); *Attridge v. Pembroke*, 235 AD 101, 256 NYS 257 (1932); *Rest. Torts* (1939), Secs. 769-772; *Sayre, Inducing Breach of Contract* (1923), 36 Harv. L. Rev. 663, 675-686; *Carpenter, Interference with Contract Relations* (1928), 41

Harv. L. Rev. 728, 748-754

20. See section 86, *infra*

21. See section 86, *infra*

22. See section 86, *infra*.

23. See sections 130, 149, 163, *infra*

24. See section 131, *infra*

25. See sections 134-140, *infra*

26. See cases, *supra*, note 16

interference with an at-will relationship.²⁷

A labor union has generally been held to be unjustified, as heretofore stated, in seeking to induce the breach of a term contract of employment. Only one court, the New York Court of Appeals, has as yet refused to indicate a position with respect to the question as to whether a labor union is privileged at common law to induce the breach of a term contract of employment by persuasion exercised upon the employee. In *Exchange Bakery Co. v. Rifkin*²⁸ that court expressed the possibility of recognition of such a privilege in the following language: "There is as yet no precedent in this court for the conclusion that a union may not persuade its members or others to end contracts of employment where the final intent lying behind the attempt is to extend its influence." The court failed to state, however, whether it meant by "contracts of employment," yellow-dog contracts or individual term contracts. In a later case, *Interborough Railroad Transit Company v. Lavin*,²⁹ the court emphasized its refusal to take a position in the matter as concerns "term contracts," as follows: "This court has not yet been called upon to decide whether employees may lawfully be urged to make a choice in breach of a definite contract. We do not decide that now." Nor has the court as yet decided the question.

Section 48. Interference with the Employment Relationship—Inducing the Breach of Contract; the Yellow-Dog Contract.

The typical yellow-dog contract is an at-will employment agreement which contains, in addition to the usual provisions for employment, the following three provisions: (1) a representation by the employee that he is not a member

27. See *Kemp v. Division No. 241*, 255 Ill 213 99 NE 389, Ann Cas 1913D, 347 (1912); *Berry v. Donovan*, 188 Mass 353, 74 NE 603, 5 LRA(NS) 899, 108 Am St Rep 499, 3 Ann Cas 738 (1905). See also *Hitchman Coal & Coke Co. v. Mitchell*, 245 US 229, 38 S Ct 65, 62 L Ed 116

260, Ann Cas 1918B, 461, LRA1918C, 497 (1917). Accord *Rest. Torts* (1939) Sec 768.

28. 245 NY 260, 157 NE 130 (1927), rehearing denied 245 NY 651, 157 NE 895 (1927).

29. 247 NY 65, 159 NE 863 (1928).

of a labor union; (2) a promise by the employee not to join a labor union; (3) a promise by the employee that, upon joining a labor union, he will quit his employment. The employee's representation that he is not a member of a labor union at the time of the commencement of his employment has not been the subject of any legal consequences. "The essential element in such a contract is the promise on the part of the worker not to become a member of the union so long as he remains in the service of his employer."³⁰ It was estimated that in 1930 more than a million workers were bound by yellow-dog contracts. While no similar recent estimate has been made, it is fairly safe to say that the present number of employees bound by yellow-dog contracts are much less than one million. Anti-injunction legislation and anti-yellow-dog legislation, coupled with National and prototype State Labor Relations Acts have made of yellow-dog contracts legally meaningless documents.

In *Hitchman Coal & Coke Co. v. Mitchell*³¹ a labor union was enjoined from seeking to induce employees bound by yellow-dog contracts to join a union, upon the ground that such attempted inducement constituted the tort of knowingly seeking to induce the breach of an employment contract. Both before and after the *Hitchman* case labor continued to contend that it had a right to organize among employees bound by yellow-dog contracts. As a first reason for its position labor alleged that the employment being a mere at-will relationship, there was no consideration for the yellow-dog provisions. But the logic of the common law doctrine of consideration was against the point because adequacy of consideration, with inapplicable exceptions, is not the subject of legal inquiry under the common law. A second reason was that the contract was procured through duress but here, too, the background of the common law was unfavorable to the argument because disparity of bargain-

30. Fuchs, *Labor Contract*, 8 *Ency of the Soc. Sci.* (1933), pp 630, 631

31. 245 US 220, 38 S Ct 65, 62 L Ed 260, Ann Cas 1918B, 461, LRA

1918C, 497 (1917). See also *Eagle Glass & Mfg Co. v. Rowe*, 245 US 275, 38 S Ct 80, 62 L Ed 286 (1917).

ing power has never been the basis for a holding of duress at common law.³²

For a third contention, labor called upon the analogy of competition. If competitors were justified under the common law to induce the breach of an at-will employment relationship, labor unions, it was argued, should likewise be justified in soliciting union membership among employees covered by yellow-dog contracts, because labor unions compete with the employer in the distribution of profits. In the *Hitchman* case the Court thought little of the argument, saying: "Defendants' acts cannot be justified by any analogy to competition in trade. They are not competitors of plaintiff; and if they were their conduct exceeds the bounds of fair trade. Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rivals' clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition."³³

Labor's fourth reason contended for was the analogy of the right of experts or friends to advise without liability, against further performance of onerous contracts. As stated by an analyst of the subject:³⁴ "(One may well ask, if a parent, in order to promote the best interest of the child, can advise the child to break a contract or, if a doctor with a similar motive can advise his patient to break a contract, or a lawyer his client, why is it illegal for a trade union officer holding a fiduciary position and entrusted with the

32. The contention advanced, by employers that collective bargaining agreements were void for duress, as where they were entered into to settle a strike called at a time which rendered the employers powerless to resist, has similarly been overruled. See section 161, *infra*.

33. The analogy of competition has been contended by some author-

ities and in some cases to be a justifying feature of labor activity. Cases approving of the analogy of competition are found at section 73, *infra*. The analogy is discussed in general more fully *infra*, at section 75.

34. Sayre, *Inducing Breach of Contract* (1923) 36 *Harv L Rev* 663, 684.

duty of advising union members for their best interests, similarly to advise acts which, in fact, constitute breaches of contract." This argument, however, has not made much of an impression upon the courts. In *South Wales Miners' Federation v. Glamorgan Coal Co.*,³⁵ the court concluded its statement of the labor union's position here discussed with the remarks: "My lords, this contention was not based on authority, and its only merits are its novelty and ingenuity."

For a fifth argument, labor asserted that union organizers had a right to induce membership among employees though bound by yellow-dog contracts because unions had a legally recognized right to organize. It is illogical to give to labor with one hand the right to organize, so the argument runs, and then to take it away with the other by giving such effect as was given in the *Hitchman* case to the yellow-dog contract. The argument was made in the *Hitchman* case but the court disposed of it by saying that it involved a "cardinal error" in the assumption "that the right to organize was absolute, whereas in truth, like other rights that exist in civilized society it must always be exercised with reasonable regard for the conflicting rights of others."

Finally, labor complained that the implications of the holding in the *Hitchman* case were not being applied to employers and labor unions alike. In *Nolan v. Farmington Shoe Mfg. Co.*,³⁶ the suit was by a labor union to restrain an employer from further exacting yellow-dog contracts from employees with knowledge that they were bound by agreement with the union not to enter into such contracts. The court dismissed the bill of complaint partly because the evidence failed to disclose that the employer was aware of the provisions contained in the union's constitution which forbade members of the union to enter into yellow-dog contract, and partly because, to quote the language of the court, "the shoe workers' protective union cannot, by incorporating inconsistent provisions into its constitution or by contract with its members curtail or abridge this right of the

35. House of Lords [1905] AC 239

36 25 F(2d) 906 (DCD Mass 1928).

employer." The Hitchman case was held inapplicable to the situation.³⁷

Labor's point of view has had fairly little effect upon the common law as distinguished from the legislative development of the subject. Most of the cases, both of Federal and State Courts, have held in accordance with the Hitchman case.³⁸ In *Callan v. Esposition Cotton Mills*,³⁹ the court went so far as to hold that where an employer posts on his premises a notice stating that his shop is non-union, an implied contract is thereby effected between the employer and his employees equivalent in terms to a yellow-dog contract. Hence labor organizers may be enjoined from organizing among the employees of the shop, because the organizers would be seeking to induce the breach of contract. Dr. Witte, in his work on "The Government in Labor Disputes" has noted that "A further cramping use of yellow-dog contracts is the practice of getting professional strike breakers temporarily employed during strikes to sign them so as to enable the employers to get injunctions prohibiting all picketing and all interference with the

37. See also *New England Wood Heel Co v. Nolan*, 167 NE 323 (Mass 1929); *Sears, A New Legal Problem in the Relations of Capital and Labor* (1926) 74 Univ of Pa L Rev 523.

38. *Patton v. United States*, 288 F 812 (CCA 4, 1923); *Keeney v. Borderland Coal Corp.* 282 F 269 (CCA 4, 1922); *Montgomery v. Pacific Electric Ry Co* 258 F 382 (CCA 9, 1919); *Dwyer v. Alpha Pocahontas Coal Co* 282 F 270 (CCA 4, 1922); *Internat'l Organization, U. M. W. A. v. Leevale Coal Co* 285 F 32 (CCA 4, 1922); *Internat'l Organization, U. M. W. A. v. Carbon Fuel Co* 288 F 1020 (CCA 4, 1923); *Clay v. Lewis*, 1 Law & Labor, No. 8, p. 8 (DCDC Ind., 1919); *Rice, Barton & Falca Machine, etc. Co v. Willard*, 242 Mass 566, 136 NE 629 (1922); *National Equipment Co v. Donovan*, 1 Law & Labor, No. 10, p. 9 (Mass 122

1919); *Ellis Co v. McBride* 3 Law & Labor, 193 (Mass 1921); *Springfield Foundry Co. v. Campbell*, 3 Law & Labor, 259 (Mass 1921); *Currier & Sons v. International Moulders' Union of North America*, 93 N.J. Eq 61, 115 A 66 (1921); *Schafer v. Internat'l Pattern Makers League*, 2 Law & Labor, 188 (Sup Ct Ohio 1920); *Quemahoning Creek Coal Co. v. Brophy*, 5 Law & Labor, 274 (Comm Pl Pa 1923); *Nashville Ry & Light Co v. Lawson*, 144 Tenn 78, 279 SW 741 (1921); *State v. Bittner*, 102 W Va 677, 136 SE 202 (1926); *Algonquin Coal Co. v. Lewis*, 3 Law & Labor 257 (W Va 1921); *Altizer v. Internat'l Organization, U. M. W. A.*, 5 Law & Labor, 123 (CCA W Va 1923); *Trade Press Pub. Co. v. Milwaukee Typographical Union*, 180 Wis 449, 193 NW 507 (1923).

39. 149 Ga 119, 99 SE 300 (1919).

plaintiff corporation or its employees.”⁴⁰ “Law and Labor,” the official organ of the League for Industrial Rights and generally known to be particularly favorable to the employers’ points of view, openly criticized the employment of yellow-dog contracts.⁴¹

In *American Steel Foundries v. Tri-City Central Trades Council*,⁴² however, the holding in the *Hitchman* case was clarified if not modified or partly reversed. Speaking of the activities of the union which the holding in the *Hitchman* case was alleged to have proscribed, the Court in the *American Steel Foundries* case said as follows: “The plan thus projected was carried out in the case of the complainant company by the use of deception and misrepresentation with its non-union employees by seeking to induce such employees to become members of the union contrary to the express term of their contract of employment that they would not remain in the complainant’s employ if union men and after enough such employees had been secretly secured suddenly to declare a strike against complainant and to leave it in a helpless situation in which it would have to consent to be unionized. . . . The unlawful and deceitful means used were quite enough to sustain the decision of the court without more.” As thus qualified, the *Hitchman* case became the springboard for holdings to the effect that a labor union could not be enjoined from peaceful persuasion intended to induce the unionization of non-union employees though covered by yellow-dog contracts of employment.⁴³ Nevertheless, in *International Organiza-*

40. Witte *The Government in Labor Disputes* (1932), p. 224

41. 2 *Law and Labor* 166 (1920)

42. 257 U.S. 184, 42 S. Ct. 72, 68 L. Ed. 189, 27 ALR 360 (1921)

43. *Bittner v. West Va. Pittsburgh Coal Co.* 15 F.(2d) 652 (CCA 4, 1926), *Gasaway v. Borderland Coal Corporation*, 278 F. 56 (CCA 7, 1921); *Exchange Bakery v. Rifkin*, 245 NY 260, 157 NE 130 (1927); *Interborough Rapid Transit Co. v. Lavin*, 247 NY 65, 159 NE 863 (1928); *La France*

Electrical Const. & Supply Co. v. International Brotherhood, 108 Ohio 61, 140 NE 899 (1923); *Boldt Construction Co. v. United Brotherhood of Carpenters & Joiners*, 3 *Law & Labor*, 227 (Comm. Pleas, Ohio, 1921), *Kilby Mfg. Co. v. Local No. 218*, 5 *Law & Labor*, 93 (Ohio App. 1922); *Kraemer Hosiery Co. v. American Federation of F. F. H. W.* 305 Pa. 206, 167 A 588 (1931).

What is a “term contract of employment” such as to preclude labor

tion, *U. M. W. A. v. Red Jacket Consolidated Coal & Coke Co.*,⁴⁴ a drastic injunction was issued restraining labor unions from organizing activities of any and all kinds among employees bound by yellow-dog contracts. The equivocal position in which labor unions thus found themselves in spite of the holding in the *American Steel Foundries case* made the yellow-dog contract one of the first lines of attack by the labor movement. Enactments which made execution by an employer of a yellow-dog contract as a condition of employment a criminal offense, were declared unconstitutional by state and federal courts,⁴⁵ but state and federal anti-injunction legislation has already met with a different fate. Statutes affecting the yellow-dog contract are stated and considered, and will be found hereafter in this work.⁴⁶

Section 49. Existence of War.

The existence of war or the national emergency incident to a post war reconstruction era has been held to constitute a bar to strikes, picketing and boycotting.⁴⁷ In all the re-

union persuasion and what on the other hand is an "at-will yellow dog contract" such as to permit like persuasion." As an obstruction to unionism and for the purpose of obviating the rule holding that labor unions may organize among non union employees even though covered by at-will yellow-dog contracts, the *Interborough Rapid Transit Company* entered into a purported two year contract of employment with one of competing unions. The company, however, reserved unto itself an option to terminate the contract at any time. In *Interborough Rapid Transit Company v. Green*, 131 Misc 582, 227 NYS 258 (1928) the court held the case governable, in view of the company's reservation of the option to terminate, by the rule holding labor unions blameless in seeking members among non-union employees governed by at-will yellow-dog contracts.

In *La France Electrical Const. & Supply Co. v. International Brotherhood* (supra), the contract gave the employer an option to terminate upon a number of days' notice. The case was held to be one involving simply an at-will yellow-dog contract of employment.

⁴⁴ 18 F(2d) 839 (CCA 4, 1927), cert. den. 275 US 536, 48 S Ct 31, 72 L Ed 413 (1928).

⁴⁵ See supra, section 25.

⁴⁶ See infra, chapter 24.

⁴⁷ See *Wagner Mfg. Co. v. Dist. Lodge*, 252 F 597 (DC ED Mo, 1919), *Kroger Groc. & Baking Co. v. Retail Clerks International Protective Association* 250 F 890 (DC ED Mo 1918), *United States v. Hayes*, decided under the *Lever Food and Fuel Act* of November 8, 1919, cited in *Bing, War Time Strikes and Their Adjustment* (NY 1921, p 155); *Fannon v. United States*, 276 F 109 (CCA 9, 1921);

ported cases involving the enjoining of labor activities because of the necessities of war or the reconstruction period following the war, the industries involved had direct relation to the National defense or the National welfare. Thus, for example, in *Rosenwasser Bros. v. Pepper*,⁴⁸ the strike involved a shoe manufacturing establishment, 80% of whose output was being manufactured for the United States government. In *Wagner Mfg. Co. v. District Lodge*,⁴⁹ the plaintiff was engaged in manufacturing munitions for the government, while in *Kroger Grocery & Baking Co. v. Retail Clerks International Protective Association*⁵⁰ the plaintiff was an owner of perishable food products and the court invoked the 1917 Food Conservation Act of Congress to justify its holding. It has, however, been held that a strike in a munitions plant which has, as its purpose and effect, the prevention of further manufacture of munitions designed for shipment abroad to a belligerent is illegal under the Sherman Act, although the United States government was at the time a neutral.⁵¹

The carrying on of war involves a national emergency of a kind which necessarily renders unwise, further continuation of the normal peacetime development of industrial relations. Few, even labor leaders, will deny the necessity for a different labor law governing a nation engaged in war. Blanket illegality of labor activity, however, without substitution of machinery designed to protect workingmen in connection with wages, hours and other conditions of employment, is neither the equivalent of social justice nor the proper means of achieving the maximum amount of efficiency among workingmen expected to cooperate in the face of the emergency. War time industrial relationship is the responsibility of executive authority. An analysis of the method by which the United States Government

West Va. Traction Co. v. Elm Grove Min. Co. 253 F 772 (DC ND W Va. 1918), *Rosenwasser Bros. v. Pepper*, 104 Misc 457, 172 NYS 310 (1918).

⁴⁸. 104 Misc 457, 172 NYS 310 (1918).

⁴⁹. 252 F 597 (DC ED Mo. 1918).

⁵⁰. 250 F 890 (DC ED Mo. 1918).

⁵¹ *U. S. v. Rintelen*, 233 F 793 (DC SD NY, 1916), *aff'd sub nom Lamar v. U. S.* 260 F 561 (CCA 2, 1919).

dealt with the labor problem during the World War will indicate the manner in which the Government has handled the causes and effects of war time industrial strife and it will, likewise, indicate some necessary measures to be taken to obviate some of the shortcomings which were thereby revealed.

Entry of the United States into the World War was at a time when causes of industrial unrest existed in the form of a generally low wage level, a generally high hours-of-employment level and a settled opposition on the part of employers to unionism. One of the first tasks of the United States Government was the construction of cantonments and in connection with that task the first War National Adjustment Board was created which was known as the Cantonment Adjustment Commission. Later, army aviation fields, storage facilities and navy shore construction were placed under the jurisdiction of the Commission and the name of the Commission changed to the "Emergency Construction Commission." In general that Commission ascertained the proper wage level by examining the provisions of bona fide collective bargaining agreements in the industries involved. Shipbuilding necessitated the appointment of another board, which was known as the "Shipbuilding Labor Adjustment Board" and which was supplemented by the "Industrial Relations Division" of the Emergency Fleet Corporation. Shipping was handled by a "Marine and Dock Industrial Relations Division" which cooperated with a "National Adjustment Commission" in the settlement of labor conditions for dock workers in general. A threatened strike at the Port of New York called forth a settlement and the creation of the New York Harbor Wage Adjustment Board. Then in September 1917, the "President's Mediation Commission" was appointed by Presidential Proclamation to deal with other industries. "The industrial troubles of a packing plant in Chicago, of the mines and lumber fields of the west, of street railways, of telephone operators and hotel workers of California were investigated and the Commission secured the return of the strikers in all but one of these industries. It was

one of the first Government agencies to establish collective bargaining by the appointment of shop committees and to insist that they be dealt with by the employers and the excellent work accomplished by these committees and the publicity which attended their installation was a powerful factor in the extension during the war of the shop committee movement."⁵² In addition to these agencies, there was an Administrator of Labor Standards in Army Clothing, a National Harness and Saddlery Adjustment Commission, Industrial Service Sections of Ordnance, Quartermaster and Aircraft, and Railroad Fuel and Food Administrations. The unfriendly attitude of the Western Union Telegraph Company to organized labor and the consequent imminence of industrial unrest induced the President to take over both the Western Union and the Postal Telegraph Companies and at the same time the Government took over the telephone system.

It was against this background that the President, upon advice of the Council of National Defense, created the National War Labor Board on April 9, 1918. The Board was composed of twelve members. Of these, employers' organizations named five employers who, in turn, designated a person representative of the general public, while employees' organizations likewise named five labor representatives who, in turn, designated a sixth who was to be a representative of the public. The Board functioned until August 12, 1919. While the jurisdiction of the Board was general, it was limited in one respect in that it was not intended to displace any of the existing boards set up for the adjustment of labor controversies. The Board possessed no power to compel arbitration of labor disputes. Its influence, nevertheless, was tremendous. The President set forth, in connection with the settlement of industrial disputes, three main principles to guide the Board in its work. The first was that "there should be no strikes or lockouts during the war." The second was that employees should have the right to organize. In the words of the President's

52. Bing, *War Time Strikes and Their Adjustment* (NY 1921) p 54

Proclamation, "the right of workers to organize in trade unions and to bargain collectively through chosen representatives is recognized and affirmed. This right shall not be denied, abridged, or interfered with by the employers in any manner whatsoever." A like guaranty was given to the employer's right to organize. Workers were forbidden, in exercising their right to organize, to coerce other workers to join their organizations or to coerce employers to bargain with them. It was further provided that "employers should not discharge workers for membership in trade unions nor for legitimate trade union activities." The third was, that existing conditions in connection with union and non-union shops should be maintained without change. The words of the guarantee were as follows: "In establishments where the union shop exists the same shall continue, and the union standards as to wages, hours of labor, and other conditions of employment shall be maintained. In establishments where union and non-union men and women now work together and the employer meets only with employees or representatives engaged in said establishments, the continuance of such conditions shall not be deemed a grievance. This declaration, however, is not intended in any manner to deny the right or discourage the practice of the formation of labor unions or the joining of the same by the workers in said establishments, as guaranteed in the preceding section, nor to prevent the War Labor Board from urging or any umpire from granting, under the machinery herein provided, improvements of their situation in the matter of wages, hours of labor, or other conditions as shall be found desirable from time to time."

Further need for centralization and generalization of treatment in connection with the labor problem prompted the organization of the War Labor Policies Board on May 7, 1918 whose functions were to plan and map out methods for the solution of industrial problems and for the formulation of policies to govern other branches of the government. In September, 1918 the "Conference Committee of Labor Adjusting Agencies" was organized for the purpose

of preventing the adoption by some agencies of policies detrimental to others.

In spite of the existence of the national emergency, and the attempt by the Government to set up machinery for the adjustment of industrial controversies, more strikes occurred during the war period than during any previous similar period in the history of the United States.⁵³ Most of the strikes took place in industries not covered by adjustment agencies while others took place before the agencies began effectively to function. A number of strikes, however, occurred in connection with industries covered by adjustment boards. Some of the strikes, however, were merely means of informing the given Board that immediate action was necessary. The boards were so overworked and were so far behind in the settlement of disputes referred to them that a habit developed of giving attention only to those cases where actual strikes existed. Labor unions began to take cognizance of this circumstance and called strikes to obtain immediate governmental attention.

An outstanding defect revealed by governmental treatment of labor problems during the World War is the fact that centralization and general treatment of labor controversies was never really achieved. The National War Labor Board should have been one of the first agencies organized instead of one of the last to be formed. There is need, in war time, for the immediate appointment of a Board having general and National jurisdiction from which all other agencies stem as subsidiaries. It is important also that all agencies be manned with adequate personnel and funds to settle controversies immediately upon their arising.

The question as to whether there ought to be compulsory arbitration of labor disputes in war time is one which involves problems not easily answerable. Labor's abhorrence of compulsory arbitration of labor disputes is a factor which must be considered at a time when cooperation of the labor movement is requested by the Government in

53. Bing, *War Time Strikes and Their Adjustment* (NY 1921) p 146.

[1 Teller]—9

the face of a National emergency. The experience of the last war was not such as to lead to the conclusion that compulsory arbitration is necessary. Given the machinery for the prompt settlement of industrial disputes, the wisdom of labor leadership may, in the absence of countervailing experience, be depended upon for cooperation. Encouraging signs that labor problems may find more appropriate solutions in the event of a war are not lacking. American employers today whose habit of mind is to fight unionism with all resources are diminishing in number. The procedure of collective bargaining has much more extensively become a part of the national industrial life. The extent to which unfair labor practice cases involving employers' refusal to bargain collectively under the National Labor Relations Act are becoming less numerous, as compared with representation cases, is likewise an indication of the creation of new areas for industrial peace, which is an indispensable prelude to national unity in times of war. Again, the guarantees of the right to organize which are increasing both in judicial decisions and in state and federal legislative enactments have done much to reconcile even the more belligerent of labor leaders to the legal order. The appointment of a fair-minded, well-staffed and well-equipped Board or Commission for the general and national prompt settlement of labor disputes would seem to be sufficient if guided by policies such as those which governed the National War Labor Board during the last war, to insure the maintenance of industrial harmony.

Several states enacted laws during the World War which outlawed strikes or which required all able bodied men to be gainfully employed.⁵⁴ The latter type of legislation was construed to prohibit strikes.⁵⁵ A Delaware law was held constitutional⁵⁶ upon the theory that while, by Article I, Section 8 of the Constitution of the United States, the Federal Government is given all the necessary powers in connection with matters of war, "this does not mean that the

54. See 7 Monthly Labor Rev 1811-1912, 1438-1439 (1918)

Labor Disputes (1932) p. 246.

56. State v. McClure, 30 Del 235,

55. See Witte, The Government in 105 A 712 (1919).

several states shall not lend every reasonable assistance to the Federal Government to aid it against an enemy in time of war." A West Virginia law, on the other hand, was held unconstitutional⁵⁷ upon the broad ground that it was an unnecessary and unreasonable restraint upon personal liberty, having no reasonable relation to the police power of the state. None of the laws contained adequate machinery for the settlement of industrial controversies. They were thus mechanical enactments which, unlike the federal treatment of labor problems, were not reflective of any desire to balance the equities in cases involving labor unrest. Moreover, they necessarily constituted interferences with the national and uniform administration of labor controversies.

Section 50. Interference with Interstate Commerce.

Speaking generally, labor activities which interfere with or restrain the normal flow of interstate commerce are dealt with under the Sherman and Clayton Acts. The interference or restraint is thus the basis of federal jurisdiction and not the source of any legal sanction. However, federal jurisdiction over interstate commerce and Interstate Commerce Acts⁵⁸ passed by Congress in the exercise of that jurisdiction have prompted holdings to the effect that labor activity may be restrained and the parties to the labor activity punished where interference with the channels of interstate commerce is thereby effected.⁵⁹ The im-

⁵⁷ *Ex parte Hudgins*, 85 W Va 526, 103 SE 327 (1920).

⁵⁸ Interstate Commerce Acts have been passed by Congress on numerous occasions, commencing with the year 1887. See 49 USCA sections 1-27, 301-327; 15 USCA section 77c.

⁵⁹ *In re Debs*, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895), *United States v. Workingmen's Amalgamated Council*, 54 F 294, 26 LRA 158 (DCD La 1893); *aff'd* 57 F 85, 6 CCA 258, 13 US App 426 (CCA 5, 1893); *Thomas v. Cincinnati, etc R.*

Co 62 F 803, 4 ICR 788 (CCS Ohio, 1894); *United States v. Cassidy*, 67 F 698 (DC ND Cal 1895); *United States v. Stevens*, 62 F 828 (DC ND Ill, 1877), *Williams v. United States*, 295 F 302 (CCA 5, 1923) *cert den* 265 US 591 44 S Ct 636, 68 L Ed 1195 (1924), *United States v. Elliott*, 62 F 801 (CC ED Mo 1894) *aff'd* 64 F 27 (CC ED Mo 1894); *United States v. Agler*, 62 F 824 (CCD Ind 1894); *United States v. Railway Employees' Department*, 283 F 479 (DC ND Ill, 1922), *Alaska S. S. Co. v. Longshoremen's Assn*,

plication of some of the cases is that there is no such thing as lawful labor activity which interferes with interstate commerce. The very interference with interstate commerce is said to be unlawful. Such was expressly stated to be the law in *United States v. Cassidy*.⁶⁰ The general trend of cases, however, distinguishes between lawful and unlawful labor activity. Interference with interstate commerce resulting from lawful labor activity is said to be legal.⁶¹ Cases on the subject are difficult of evaluation because in most instances railroads are involved thereby introducing the element of a public utility,⁶² while in some instances a receiver is the party plaintiff.⁶³ There does not appear to be any present guide to determine the legality of a given form of labor activity, where interference with interstate commerce is the basis of legal sanction. No question will be had with a case like *Williams v. United States*,⁶⁴ where the evidence disclosed that the defendants, in connection with a labor dispute, sought to disable locomotives engaged in interstate commerce by means of the introduction into the boilers of the locomotives, of quicksilver and other injurious chemicals designed to act on the copper at the points between the flues and the steel engine walls so as to cause the flues to leak. Differences of opinion, however, will be occasioned over holdings that a secondary

236 F 964 (DC WD Wash 1916), *Stephens v. Ohio State Telephone Co.* 240 F 759 (DC ND Ohio 1917)

⁶⁰ 67 F 698 (DC ND Cal 1905). See also *Arthur v. Oakes*, 63 F 310 (CCA 7, 1891), *In re Charge to the Grand Jury*, 62 F 828 (DC ND Ill 1894), *In re Grand Jury*, 62 F 840 (DC ND Cal 1894).

⁶¹ See *Wabash R. Co. v. Hannahan*, 121 F 563 (CC ED Mo 1903), *Great Northern Ry. Co. v. Local Great Falls Lodge*, 283 F 557 (DC D Mont 1922). See also *Hopkins v. United States*, 171 US 578, 19 S Ct 40, 43 L Ed 290 (1898).

"When strikes affecting interstate commerce are conducted for purposes

which the courts deem improper, then the interstate commerce acts may be invoked against them, but if the purpose is otherwise lawful, these acts have no application." Witte, *The Government in Labor Disputes* (1932) p. 75.

⁶² The legality of labor activity in connection with public utilities is considered at section 53, *infra*.

⁶³ The legality of labor activity in connection with a business in the possession of a receiver is discussed at section 52, *infra*.

⁶⁴ 295 F 302 (CCA 5, 1923) cert. den. 265 US 591, 44 S Ct 636, 68 L Ed 1195 (1924).

strike is an illegal interference with interstate commerce.⁶⁵

It has been held that the Clayton Act does not affect the right to an injunction against labor activity which interferes with interstate commerce.⁶⁶ It has also been indicated that the right to injunctive relief has survived the Norris Act where unlawful interference with interstate commerce is alleged.⁶⁷

The character and extent of interference necessary to characterize the activity as an obstruction of interstate commerce involves two considerations: (1) the meaning of interstate commerce; (2) the language of the particular statute. The ambit of interstate commerce, which has been widened by recent United States Supreme Court holdings, is discussed in a later portion of this work.⁶⁸ Here, it is necessary to state that the courts have drawn a distinction between unlawful activity in connection with instrumentalities of interstate commerce and like activity which takes effect upon intra-state instrumentalities but whose consequences affect interstate commerce. With respect to the instrumentalities of interstate commerce, such as railroads, it is the law that no intent needs to be shown to restrain interstate commerce. The mere activity upon the instrumentality which moves in interstate commerce, if unlawful, is held to constitute an obstruction.⁶⁹ Where, on the other

⁶⁵ *In re Lennon*, 166 U.S. 548, 17 S. Ct. 678, 41 L. Ed. 1110 (1897); *Thomas v. Cincinnati, N. O. & T. P. Ry. Co.*, 62 Fed. 803 (CC. SD. Ohio, 1894); *United States v. Elliott*, 64 F. 27 (CC. ED. Mo. 1894); *Toledo Ann Arbor, etc. Ry. Co. v. Pennsylvania Co.*, 54 F. 730 (CC. ND. Ohio 1893); *United States v. Cassidy*, 67 F. 698 (ND. Cal. 1895); *Wabash R. R. Co. v. Hannahan*, 121 F. 563 (CC. 1D. Mo. 1903); *Toledo Transfer Co. v. International Brotherhood of Teamsters*, 7 Law & Labor 33 (US. DC. ND. Ohio, 1925).

⁶⁶ *Western Union Telegraph Co. v. International Brotherhood*, 2 F.(2d) 993 (DC. ND. Ill., 1924), *aff'd* 6 F.(2d)

414 (CCA 7, 1925). *c/f* *Great Northern Ry. Co. v. Brosseau*, 286 F. 414 (DCD. ND. 1923).

⁶⁷ See *Oswald v. Leader*, 20 F. Supp. 876 (DC. ED. Pa. 1937); *Mayo v. Dean*, 82 F.(2d) 554 (CCA 5, 1936) *aff'd* 9 F. Supp. 459 (DC. WD. La. Lake Charles Division 1935) and *rev'g* 8 F. Supp. 73 (DC. WD. La. Lake Charles Division 1934); *Fehr Baking Co. v. Bakers Union*, 20 F. Supp. 691 (DC. WD. La. Lake Charles Division, 1937).

⁶⁸ See section 417, *infra*.

⁶⁹ *Williams v. United States*, 295 F. 302 (CCA 5, 1923); *Vandell v. United States*, 6 F.(2d) 189 (CCA 2, 1925); *United States v. Thomas*, 55

hand, the activities connected with the alleged unlawful acts are done in connection with intrastate businesses such as an intrastate coal mine, it is necessary to show an intent to obstruct interstate commerce.⁷⁰

Obstruction of interstate commerce renders the obstructor liable to injunction either at the suit of the aggrieved private party or of the United States Government, and to criminal prosecution under the criminal code. The case which settled it, that the United States Government may sue to enjoin interference with interstate commerce is the famous *Debs* case.⁷¹ The case arose out of a railway strike and involved, in addition to the element of the strike, alleged unlawful activities, the defendants being accused of having obstructed the running of trains "by removing the spikes and rails from the track thereof, by turning switches and displacing and destroying signals, by assaulting and interfering with and disabling the switchmen and other employees of said railroad companies having charge of the signals, switches and tracks of said companies. . . ." A blanket injunction restraining both lawful and unlawful conduct was issued by the court. The defendants were punished for contempt for violation of the injunction and petitioned for a writ of habeas corpus which the United States Supreme Court denied. While interference with interstate commerce was one of the main grounds upon which the Court decided the case, obstruction of the mails being the other main ground, it appeared also from the complaint that the defendant's conduct was sought to be held illegal because (1) the trains were charged with the duty of carrying troops and military forces; (2) railroad trains were public utilities; (3) the trains carried food products which were necessary for the health and welfare

F 386 (DCD W Va 1893); *Knudsen v. Benn*, 123 F 636 (CC Minn 1903); *United States v. Drylie*, 7 Law & Labor 69 (DC Ohio 1934).

70. *United Mine Workers v. Coronado Coal Co.*, 259 US 344, 42 S Ct 570, 66 L Ed 975, 27 ALR 762 (1922); *United Mine Workers v. Coronado*
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Coal Co., 268 US 205, 45 S Ct 551, 69 L Ed 983 (1925); *Apex Hosiery Co. v. Leader*, 310 US 469, 60 S Ct 982, 84 L Ed 1311 (1940). See also *United States v. Hency*, 280 F 165 (DC ND Texas 1923).

71. 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895).

of a large part of the nation and, (4) two of the railroads were in the hands of receivers appointed by the courts of the United States. The court drew a distinction between interference with interstate commerce which results from lawful and that which results from unlawful activities. Nevertheless, the blanket injunction issued by the District Court was sustained because questioned not by direct appeal but by collateral attack, through habeas corpus proceedings. The holding of the case can best be stated by quoting the following language of the court: "we hold that the government of the United States is one having jurisdiction over every foot of soil within its territory, and acting directly upon each citizen; that while it is a government of enumerated powers, it has within the limits of those powers all the attributes of sovereignty; that to it is committed power over interstate commerce and the transmission of the mail; that the powers thus conferred upon the national government are not dormant, but have been assumed and put into practical exercise by the legislation of Congress; that in the exercise of those powers it is competent for the nation to remove all obstructions upon highways, natural or artificial, to the passage of interstate commerce or the carrying of the mail; that while it may be competent for the government (through the executive branch and in the use of the entire executive power of the nation) to forcibly remove all such obstructions, it is equally within its competency to appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions. . . ."

Section 51. Obstruction of the Mails.

Labor activity which results in the obstruction of the United States mails has been held unlawful in a number of cases.⁷² Here, as in the case of interference with interstate

72. See *In re Debs*, 158 US 564 15 125, 40 L Ed 260 (1895); *Thomas v. S Ct* 900, 39 L Ed 1092 (1895); *Clune Cincinnati, etc R Co* 62 F 803, 4 ICR v. *United States*, 159 US 590, 16 S Ct 788 (CCSD Ohio 1894), *United States*

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commerce, the sanctions are criminal prosecution and injunction at the suit either of a private party or the United States government exercising its proprietary interest in the United States mails. Here, too, the cases are confusing on the question whether the obstruction, to be criminal or enjoined, must be by unlawful labor activity or whether, on the other hand, no labor activity can be lawful if it obstructs the United States mails. Expressly holding that labor activity cannot be lawful if it obstructs the United States mails is *United States v. Cassidy*.⁷³ In *Wabash Railroad Co. v. Hannahan*⁷⁴ the court expressly held to the contrary, viz: that labor activity, to be censurable upon the ground of obstructing the United States mails, must be unlawful. Here, again, the cases contain no guide as to what labor activity is lawful, and what is unlawful. Finally the cases here, as in the decisions involving interferences with interstate commerce, are complicated by the fact that in most instances railroads which are public utilities are involved, while in some instances the plaintiff is a receiver.

Involvement of the mails with the activities of organized labor has other aspects. Thus, in the August, 1922 issue of "Law and Labor"⁷⁵ there is an account of a ruling by the general solicitor of the Post Office Department holding unmailable, stickers printed by the San Francisco Trades Council and designed for attachment to all outgoing mail, which requested people to stay away from San Antonio, Texas, because it was an "open shop" city, where bad working conditions prevailed and poor wages were paid. On the other hand, an investigation conducted by the Committee on Post Offices and Post Roads of the United States

v. Cassidy, 67 F 698 (DCND Cal 1905). *United States v. Stevens*, Fed Cas No 16392. *Southern Cal Ry Co. v. Rutherford*, 62 F 803 (CCLD Ohio 1894). *United States v. Elliott*, 64 F 27 (CCED Mo 1894); *In re Charge to Grand Jury*, 62 F 828 (DCND Ill 1894); *In re Grand Jury*, 62 F 834 (DCSD Cal 1894); *In re Grand Jury*, 62 F 840 (DCND Cal 1894),

United States v. Agler, 62 F 821 (CCD Ind 1894), *United States v. Debs*, 63 F 436 (CCND Ill 1895), *Clements v. U. S.*, 297 F 206 (CCA 9, 1924), cert den. 266 US 605, 45 S Ct 92, 69 L Ed 464 (1924).

73. 67 F 698 (DCND Cal 1905).

74. 121 F 563 (CCED Mo 1903).

75. 4 Law & Labor 233 (1922).

Senate⁷⁶ in 1937 revealed instances where mail was not delivered to establishments involved in strikes, the Post Office authorities justifying their position in the danger which would be occasioned to the life and limbs of the postmen attempting to deliver mail to such establishments.

Section 52. Business in the Hands of a Receiver.

The fact that a business is in the hands of a receiver has been held to justify injunctions against labor activities,⁷⁷ upon the theory that the actions of the workmen are interferences with the jurisdiction of the court. It has been noted that a receiver is appointed to continue a business or care for property in the ordinary way and that labor activity which is peaceful and does not involve violence, intimidation or other unlawful interference with the property in the hands of the receiver, should consequently be held legal.⁷⁸

It has been held that a business though in the hands of a receiver is not immune from legal and peaceably conducted strikes.⁷⁹ It has even been held that a court may, in the exercise of jurisdiction over its receiver, direct him to meet with and treat with labor unions for the purpose of adjusting a labor controversy.⁸⁰

Much of the law governing the question has been made obsolete by provisions contained in the Chandler Act gov-

76 Hearings before the committee on post offices and post United States Senate, 75th Congress, First Session, S Res 140.

77. See *In re Debs*, 158 US 564 15 S Ct 900, 39 L Ed 1092 (1895), *Secor v Toledo, etc R Co*, Fed Cas No 12,605 (CCND Ill 1877); *United States v. Kane*, 23 F 748 (CC Colo 1885), *In re Doolittle*, 23 F 544 (CC ED Mo 1885); *McGibbony v Lancaster*, 286 F 129 (CCA 5, 1923); *King v. Ohio etc Ry Co*, Fed Cas No. 7,800 (CCD Ind 1877), *United States v Weber*, 114 F 950 (CCWD Va 1902); *Arthur v. Oakes*, 63 F 310, 25 LRA 414 (CCA 7, 1894), *In re Hig-*

gins, 27 F 443 (CCND Texas 1886). The first labor injunction involved a business in the hands of a receiver. See *Nelles, A Strike and its Legal Consequences An Examination of the Receivership Precedent for the Labor Injunction* (1931), 40 *Yale LJ* 507.

78. Comment, 17 *Harv L Rev* 196, 197 (1904).

79. *Arthur v. Oakes*, 63 F 310, 25 LRA 414 (CCA 7, 1894); *United States v Weber*, 114 F 950 (CCWD Va 1902), *Beers v Wabash Railroad Co* 34 F 244 (CCND Ill 1888)

80. *Waterhouse v Comer* 55 F 149 (CCWD Ga SD 1893).

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erning bankruptcies.⁸¹ It is provided by the Act that the judge may, upon good cause shown, in connection with corporate reorganizations under the Act, "permit a labor union or employees' association, representative of employees of the debtor, to be heard on the economic soundness of the plan affecting the interests of the employees."⁸² It is further provided⁸³ that the "right of employees or of persons seeking employment on the property of a debtor under the jurisdiction of the court to join a labor organization of their choice, or its refusal to join or remain members of a labor organization of their choice, or to refuse to join or remain members of a company union, shall be free from interference, restraint or coercion by the court, a debtor or trustee." Provision is also made for the termination of any agreement restricting or interfering with employees' rights. It is also provided that "no funds of the estate shall be used by the debtor or a trustee for the purpose of maintaining company unions." The term "company unions" is not defined.

Section 14 of the National Labor Relations Act provides that the Act shall prevail over contrary provisions of the Bankruptcy Act, "provided, that in any situation where the provisions of this chapter cannot be validly enforced, the provisions of such other sections shall remain in full force and effect."⁸⁴

Section 53. Public Utilities.

Public utilities have been held insulated from labor activity of any kind, their duty to serve the public being considered a proper basis for injunctive relief against any interference.⁸⁵ Thus, in *Stephens v. Ohio State Telephone Co.*,⁸⁶ subscribers of a telephone company were held entitled to an injunction restraining a strike which interfered

81. Act of June 22, 1938, c. 575, 52 Stat 840, 11 USCA.

82. 52 Stat 894 (1938), 11 USCA section 606.

83. 52 Stat 904 (1938), 11 USCA section 672.

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84. 49 Stat 457 (1935) sec. 14, 20 USCA sec. 164. See *infra*, sections 272, 407.

85. *Stephens v. Ohio Telephone Co.* 240 F 759 (DCND Ohio 1917).

86. 240 F 759 (DCND Ohio 1917).

with their telephone service.⁸⁷ A combination among unions and common carriers to refuse to accept the plaintiff's lumber for carriage because the plaintiff was involved in a labor dispute has been held to constitute a combination in restraint of trade.⁸⁸

That public utilities are not immune from peaceful and otherwise lawful strikes, picketing and boycotting is the implication of one case,⁸⁹ and the express holding of another.⁹⁰ It has been held that a railway system and a railway employee's union may enter into a closed shop contract.⁹¹ Public utilities have been held to come within the purview of the National Labor Relations Act.⁹² It is undoubtedly true that public utilities, involving as they do services indispensable to the well ordered life of the community, require a different treatment in connection with labor controversies. On the other hand, blanket illegality of all labor activities in connection with public utilities ignores the fact that workingmen employed by public utilities may have complaints as real as those possessed by workingmen employed in private industry. Legislation such as the Railway Labor Act would appear to be a better

87 See also *Western Union Telegraph Co. v. International Brotherhood*, 2 F(2d) 993 (DCND Ill E 1924), aff'd 6 F(2d) 444 (CCA 7, 1925). The prevailing rule is that a public utility is not excused from performing its duties because of a strike or other labor interferences. *Stephens v. Ohio State Telephone Co.* 240 F 759 (DCND Ohio 1917), *Geismer v. Lake Shore & Mich. So. Ry. Co.* 102 NY 563, 7 NE 828 (1886). *Panhandle and Santa Fe Rwy. Co.* 235 SW 913 (Texas 1922). *Contra* *Rear-don v. International Merc. Marine Co.* 189 AD 515, 178 NYS 722 (1919). See *Thompson, Labor Law and Public Utilities* (1922), 22 Mich L Rev 1.

88. *Burgess Bros. v. Stewart*, 112 Misc 347, 184 NYS 199 (1920). See also *Toledo, etc., Railroad Co. v. Pa.*

54 F 730, 18 LRA 387 (CCND Ohio 1893).

89. See *Puget Sound Traction Co. v. Whitley*, 243 F 945 (DCWD Wash 1917).

90. *Kinloch Telephone Co. v. Local Union*, 265 F 312 (DCED Mo 1920).

91. *Williams v. Quill*, 277 NY 1, 12 NE(2d) 547 (1938), App dis 303 US 621, 58 S Ct 650, 82 L Ed 601 (1938). See also *Post v. Buck's Stove & Range Co.* 200 F 918, 43 LRA(NS) 498, 119 CCA 14 (CCA 8, 1912).

92. *Consolidated Edison Co. v. NLRB*, 305 US 197, 59 S Ct 206, 83 L Ed 126 (1938), *Consumers Power Co. v. NLRB* 701 (1938); *Wisconsin Power & Light Co. v. NLRB* 320 (1938), *So. California Gas Co. v. NLRB* 1123 (1939); *Interstate Water Co. v. NLRB* 411 (1939).

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method of dealing with the subject.⁹³ Public Service Commissions in many states are vested with more or less extensive authority to deal with labor controversies in connection with public utilities. In *Public Service Commission v. International Railroad Co.*,⁹⁴ the right of a Public Service Commission to order the reinstatement of strikers with back pay was assumed but mandamus in enforcement of the order was refused because it appeared that the utility did not have and could not borrow the money necessary to comply with the order.

Impairment of the efficiency of non-industrial functions, as where the employer is a charitable hospital corporation, has been held to constitute a bar to all activities of labor unions, including striking, picketing and boycotting.⁹⁵

Section 54. Commodity Vitally Necessary to the Community.

The fact that a given commodity vitally necessary to the community is involved, such as milk, has been held to qualify the right to engage in labor activity in connection with the business handling such commodity.⁹⁶

Section 55. State's Right to Enjoin Labor Activity.

It has been seen that the United States government has a right to enjoin labor activity which interferes with the mails or constitutes an obstruction of interstate commerce, upon the theory that the government has a proprietary interest in the mails and in the free and uninterrupted flow of interstate commerce.⁹⁷ There are several cases which go further and hold that a state may institute proceedings to enjoin a strike or other labor activity which so interferes with the business life of the community and the production,

⁹³. See section 239, *infra*, for a discussion of the Railway Labor Act

⁹⁴. 224 NY 631, 120 NE 727 (1918).

⁹⁵. *Jewish Hospital of Brooklyn v. Hospital Employees Union*, 252 AD 581, 300 NYS 1111 (1937).

⁹⁶. *Gottlieb v. Matchkin*, 117 Misc 128, 191 NYS 777 (1921), see also *Wiest v. Dirks*, 20 NE(2d) 969 (Ind 1939).

⁹⁷. *In re Debs*, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895); see sections 50-51 *supra*

exchange and transportation of food and other necessities, as to endanger public welfare.⁹⁸

Section 56. Mutiny and Desertion.

Ships at sea or even at a port of refuge have been held immune from legal strikes because constituting mutiny or desertion.⁹⁹ Shipping and the maritime industry in general have been held to come within the purview of the National Labor Relations Act,¹ and in *Black Diamond Steamship Corporation v. NLRB*,² it was held that striking seamen were properly ordered by the NLRB to be reinstated to take the place of seamen hired after the steamship company had refused to bargain with the union though certified after election as the employees' appropriate bargaining agent. In *Barfield v. Standard Oil Company of New Jersey*,³ the plaintiff sued to recover wages earned prior to the time he engaged in a strike. The defendant resisted the claim in reliance on a Federal statute,⁴ which provides that upon desertion of a vessel all or any part of the wages earned are forfeited. The plaintiff replied that a right to organize and to strike, being guaranteed by the National Labor Relations Act, ought not to be placed under such a disability as forfeiture of wages actually earned, but the court, nevertheless, dismissed the plaintiff's complaint, holding the Federal statute dispositive of the case.

Maritime labor relations are now governed also by the

98. *Re Wood*, 194 Cal 49, 227 P 908 (1924); *People v. United Mine Workers*, 70 Colo 269, 201 P 54 (1921); *State ex rel Hopkins v. Howat*, 109 Kan 376, 198 P 686, 25 ALR 1210 (1921); *Writ of Error dismissed sub nom. Howat v. Kansas*, 258 US 181, 42 S Ct 277, 66 L Ed 550 (1922).

99. See *Rees v. United States*, 95 F(2d) 784 (CCA 4, 1938), where the court indicated, however, that a right to strike might exist with respect to a vessel moored to a dock or at anchor in a safe harbor. See

Rothschild, the Legal Implication of a Strike by Seamen (1936), 45 Yale L Jour 1181.

1. See *Ocean Steamship Co. of Savannah*, 2 NLRB 588 (1937); *International Mercantile Marine Co.*, 2 NLRB 971 (1937); *New York and Cuba Mail Steamship Company*, 2 NLRB 595 (1937).

2. 94 F(2d) 875 (CCA 2, 1938), cert den 304 US 579, 58 S Ct 1044, 82 L Ed 1542 (1938).

3. 172 Misc 95, 14 NYS(2d) 684 (1939).

4. 46 USCA section 701.

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Merchant Marine Act of 1936 ⁵ which sets up a maritime labor board entrusted with the duty of adjusting, mediating and arbitrating labor disputes.⁶

5. 49 Stat 1992 (1936) as am. by Public No. 705 (75th Congress-c. 600; 3rd Session); 46 USCA section 1131(a).

6. See *infra*, section 408, for a more extended statement of the provisions of the Merchant Marine Act of 1936.

CHAPTER 6

THE RIGHTFUL ASPECT

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Section 57. Foundations of Discontent.

The ideal society which classical economists envisaged as inherent in the notion of the free market never really existed. Actualities developed almost from the very beginning of the industrial revolution which were at variance with the theorizing of the books—actualities which some have contended to be the necessary consequences of the underlying notions of *laissez-faire*. In England the poverty of the working classes enlisted the help of Carlyle and Friedrich Engels, whose "Conditions of the English Working Classes" described the deplorable results of an apparently perfect ideology in terms of widespread oppression and outright social injustice. In America, workingmen began to divorce themselves from employers' associations and societies. "What is the use of improving our skill and increasing our output," they complained, "if we cannot protect ourselves against falling wages?"¹ So long as the apprentice could hope to marry his master's daughter, the widespread development of enduring labor organization was retarded. Nor did the substitution of machinery for the handicraftsman produce an immediate class consciousness among those who fell victims to the new cleavage in industry. Vast areas of unoccupied land and the rich natural resources in America constantly widened the ambit of enterprise. Wagons rolling westward carried with them American folkways of independence. Reliance was still upon the individual. Circumstances combined to militate against any general class consciousness. Entrepreneurship was still sufficiently possible to develop in the individual a spirit of determined individualism. But the factory system developed the machine age along with the congested, impersonal city, to the point that the worker continued to become a specialized mechanical instrument whose bargaining power diminished to the extent that he could the more easily be replaced. We must look to capitalist innovations to explain the collectivist viewpoint. The worker noted his

1. Mary A. Beard, *A Short History of the American Labor Movement*, p. 18.

ever-extending impotence. The teachers of the new era made much of the evolution of the individual from a mine of competitive energy to a machine.

Section 58. Underlying Ideas of Modern Labor Activity.

We may discern four rather clearly defined stages in the evolution of present day labor activity: first, a period of discouragement over the failure to achieve better conditions for self and family through individual effort. The labor movement has progressed to the extent, in part, that people's visions of future riches or advancement have been dimmed by countervailing human experience. Second, a gradual awakening to a lot in life—the employee's lot—and a consequent development of kinship with similarly constituted folk. Third, a period of despair alike with legislative inaction toward the employee's plight as well as socialist idealizations about a future state. In England, the inefficacy of the Factory Acts led to trade-unionism in the middle of the 19th century, while later in the 19th century American labor leaders observed with care and reassuring determination the failure of the worker to obtain a better deal from legislatures in the decade from 1880 to 1890. Fourth, the emergence of a philosophy of the tactics of combination in the economic field, for the purpose of asserting alleged workers' rights. The modern labor movement reflects its evolution most remarkably. Labor leaders today are neither philosophers nor, in the theoretical sense, social reformers. The strike, alike with the picket and the boycott, are "hard won extra-judicial remedies"² employed for the achievement of immediates.

Capitalist ideologists have insisted upon taking credit for galvanizing the wheels of production to their present efficiency, and have argued with even greater emphasis that individualism must continue to be the way of thinking about the economic order. The more radical among common men whose lots were those of insecure workingmen have contended, upon the other hand, that such an outlook is a

2. *Sherman v. Abeles*, 265 NY 385, 193 NE 241, 95 ALR 1384 (1934)

[1 Teller]—10

baseless conceit coupled with a fraud by the few upon the many. Socialist as well as individualist economy could have moulded in the past and can in the present, they have been saying, mould the raw materials of production with wonders equally as great. And the institution of private property, it is contended, is a barrier raised by the more aggressive to keep the rich natural resources away from all humans, who in the nature of things are entitled to share in the common fund of worldly goods. What we call the modern labor movement stands midway between these opposing viewpoints. It is difficult to cast present day labor activity into a precise mold of simple definition in terms of its political and economic implications. Although its underlying prepossessions might, in a descriptive sense, be considered in the language of battlefield terminology—workers at war for more—it has no necessary quarrel with existing sovereignty. Nor does it question the foundations of constituted political authority. Nor, indeed, does it necessarily gainsay the ultimate wisdom of the institution of private property, the wage system, and the broad characteristics of capitalist enterprise. Traditional exposition of organized effort is not helpful, for, with the possible exception of the general strike, the modern American labor movement is synonymous with neither revolution, revolt, insurrection nor rebellion. Alarmist viewpoints notwithstanding twentieth century trade-unionism has been remarkably free of any revolutionary point of view. Component groups have, to be sure, argued that workers' progress ought not to be subjected to the vicissitudes of capitalist enterprise. The trade union dialectic, it has been asserted, has a destiny all its own. But the leading lights of the American labor movement have generally been content to be guided by the conception that wages, hours and other terms and conditions of employment, though necessarily the subject matter of progress and change in accordance with a philosophy of time, place, and circumstances, are ultimately the reflections of profit and enterprise.

Yet the strike, picket and boycott have admittedly mani-

fested a militant disagreement with existing law. It is not entirely accurate to say that workers in combination seek merely to substitute collective bargaining for the individual bargain within the framework of a social order unqualifiedly accepted, for to do so would be to confuse means with ends. The strike, alike with the picket and boycott, signify basically a refusal by labor to be a lesser beneficiary of the wage system. They reflect the demand too, that human cost be substituted for money cost as the guiding conception in the determination of industrial efficiency. And to the extent that they contend for a share in the control of industry, they seek to qualify the institution of private property, since the traditional essence of that institution is the right to exclusive domain in the field of decision. Underlying the modern labor movement is the dogma that workingmen must unite to secure the benefits in industry, of democracy in a capitalist society. Here is the core of insistence upon collective bargaining. And all this, trade unionists insist, is but an application or a set of applications of the way of thinking which is called liberty or equality when employed as terms descriptive of the ideals of those engaged in business enterprise. That the labor movement has encountered illegality is said among the more outspoken to constitute evidence that employers trample on legality whenever it is no longer useful to them. More cautious pro-labor voices, however, point to the contrast between the single entrepreneur who antedated the industrial revolution and the large business associations which followed that event, for the purpose thereby of explaining the necessity for similar organizations among workingmen.

Section 59. Bargaining in the "Free and Open Market."

The simple notion of a self-regulative free and open market wherein equal bargaining prevails, which the classical economists conceived, has been marred by inequalities in bargaining power too numerous to admit of any cavil. Consumers' unions and consumers' leagues have become a

definite pattern in our economic life.³ So have farmers' cooperatives, permissive statutes in regard to which have been enacted in most every state and by the federal government.⁴ And so have associations of small retail store owners, formed for the purpose of combating the alleged evils and some of the alleged advantages obtained by chain stores.⁵ Labor organization is simply one of the many of the groupings among human beings aware of their individual impotence, the better to compete in the economic life.⁶ The assumption that the individual workingman is unequal to the task of bargaining is the historical explanation of the labor movement, and the clue to modern judicial, executive and legislative doctrines. Syndicalist intrusions have, to be sure, marred the generality, but that the generality has present validity cannot be gainsaid.

Much of the sway of judicial decision alike with legislative enactments can be explained partly as the reflections of evaluations in connection with the bargaining factors involved. The distinction in the permissibility of picketing of "small" as distinguished from "large" business has proceeded partly upon the ground that a difference in bargaining power necessitates a difference in legal doctrine.⁷ The

3. See Fowler, *Consumer Cooperation in America*.

4. See Hanna, *Law of Cooperative Marketing Associations*, Chapter 3, 5 Williston on Contracts (Rev Ed), Sec 1656A. See also Richberg, *The Need for Revision of the Anti Trust Laws* (1936), 22 ABAJ 804; Williston, *Freedom of Contract* (1921), 6 Corn LQ 365.

5. Chain store taxes designed to embarrass chain stores by adding disproportionately with small store owners, substantial taxation as an item of doing business, are one of the reflections of small retail store owners' activities. See *Tax Comm v. Jackson*, 283 US 527, 51 S Ct 540, 75 L Ed 1248, 73 ALR 1465 (1931); Williston on Contracts (Rev Ed), Sec 1658A.

6. See *Paramount Pictures, Inc v United Motion Picture Theatre Owners*, 93 F(2d) 714 (CCA 3, 1937), which involved the case of a secondary boycott undertaken by a group of independent exhibitors to induce the plaintiff to give them better terms. The boycott was held violative of the Sherman Act. A comment on the case in 51 Harv L Rev 1304, 1305 (1939), notes that the "bargaining power of the independent exhibitor, unless he acts in concert with his fellows, remains comparatively insignificant, even though the anti-trust acts have been invoked successfully to curb some of the abuses arising from the concentrated control of production and distribution in the motion picture industry."

7. See *Dolan v. Cooks Union*, 124

New York rule questioning the tort of inducing the breach of contract insofar as employers seek to employ yellow-dog or even term contracts to enjoin labor activity⁸ is also in point; such contracts under the view taken in that state might, in the light of the fact that inequality of bargaining power induced their formation, be subject to the superior right of a labor union to act in disregard thereof. Anti-yellow dog statutes and anti-blacklisting legislation find a common source in governmental recognition of the inability of workingmen to bargain freely with representatives or possessors of capital.⁹

Upon the other side of the legislative books are Iowa, Michigan, Minnesota and Wisconsin statutes requiring notice of intent to strike or forbidding strikes during a period of investigation,¹⁰ enacted because of complaints against sudden strikes allegedly called to take advantage of given circumstances which prevented employers from bargaining on an even basis with combined employees. The Railway Labor Act of 1934, coming as it did at a time when labor's rights had been long recognized in the railroad industry, and further guaranteed by the Railway Labor Act of 1926, further limited strikes because bargaining power had now been, in the eyes of the legislators, more evenly balanced between capital and labor.¹¹ The appraisal, whether by the

NJ Eq 584, 4 A(2d) 5 (1938), *Stalban v. Friedman*, 171 Misc 106, 11 NYS(2d) 343 (1939), *rev'd* in 259 AD 520, 19 NYS(2d) 978 (1940).

⁸ See *Exchange Bakery v. Rifkin*, 245 NY 260, 157 NF 130 (1927) rehearing denied 245 NY 651, 157 NE 895 (1927), *Interborough Rapid Transit Co. v. Iavm*, 247 NY 65, 159 NE 863 (1926), *Interborough Rapid Transit Co. v. Green*, 131 Misc 682, 227 NYS 258 (1928).

⁹ In point also are statutes limiting the duration of employment contracts whose purposes are to prevent "contract labor" and to prohibit long term contracts oppressive to workingmen entered into through

disparity of bargaining power. See Commons and Andrews, *Principles of Labor Legislation* (Rev. ed. 1927) p. 42, comment, 35 Col L Rev 297 (1935).

¹⁰ Iowa (1935 Code, ch. 74, Secs. 1496-1509), Michigan (Acts 1939, No. 176, sections 9, 9a), Minnesota (Chapter 440, Laws of 1939, Sec. 6), Wisconsin (Laws of 1939, ch. 57, Sec. 111.11). For a more detailed discussion of these statutes see *infra*, section 458. See also Section 437, *infra*, for statutes dealing with compulsory arbitration of labor disputes.

¹¹ See Frankel, *Recent Statutes affecting Labor Injunctions and Yellow-Dog Contracts* (1936) 30 Ill L

courts or by legislatures, of the disparity in bargaining power in cases involving industrial disputes is a continuing process as yet but imperfectly understood. *Association of Plumbing & Heating Contractors v. Merten*¹² is an interesting case in point. There a contract entered into between an association of employers and one of its members which prohibited any member of the association from dealing singly with the union and from hiring union employees during a strike without the prior consent of the association was held illegal and void as against the public policy resulting from the provisions of the New York State Labor Relations Act. Said the court: "The banding together of the employers for the purposes set forth in the instant contract further accentuates the disparity in the bargaining power between the parties which the Act sought to equalize, and in so doing further promotes industrial strife which the Act sought to minimize."

Section 60. Legality of Labor Unions.

The legality of labor unions, as distinguished from strikes, pickets, boycotts or other forms of labor activity carried on by them, is universally conceded.¹³ Early English cases, to be sure, declared labor unions illegal,¹⁴ and

Rev. 854; Symposium on Labor (1936) 184 *Annals, Am Acad of Pol & Soc Sci* 1

12. 173 Misc 448, 17 NYS(2d) 828 (1940)

13. For cases, see section 61, *infra*.

14. *The Tubwomen v. Brewers of London*, cited in *Rex v. Journeymen Taylors*, 8 Mod 10, 88 Eng Rep 9 (1721); *Rex v Journeymen Taylors*, 8 Mod 10, 88 Eng Rep 9 (1721); *Rex v Eccles*, 1 Leach CC 276, 168 Eng Rep 240 (1783); *Rex v. Mawbey*, 6 Term 619, 636, 101 Eng Rep 736, 3 Bay Rep 282 (1796). The *Tubwomen* case has been said to be a doubtful authority: "The volume of the 'Modern' reports, in which this reference is found (to the *Tub Women v. Brewers of London*) is one of

the least reliable of the English reports, being full of inaccuracies, blunders and misstatements. Burrows, in his reports, speaks of it as a 'miserable bad book' and says that upon being cited, the Court of King's Bench treated it with the contempt it deserved (1 Burr 368); and by an excellent authority upon the books of reports and their reporters, it is characterized by the epithet of execrable (Wallace's Common Law Reporter 3rd ed p. 226). The title '*The Tub Women v. The Brewers of London*' is undoubtedly a mistake and it has been conjectured that the case referred to is the *King v. Sterling* and others reported in 1 Lev 125; 1 Sid 274; 1 Keb 360. See the conjectures of Mr. Emmett and Mr.

in America cases to like effect are to be found in the states of New York and Pennsylvania.¹⁵ But whatever doubt may have existed with respect to the legality of labor unions in England was resolved by statutes in 1825¹⁶ (which exempted labor unions from the combination laws),¹⁷ in 1871¹⁸ (which withdrew the rule holding labor unions combinations in restraint of trade,¹⁹ and hence, for example, unable to seek legal redress for embezzlement of union funds by officers),²⁰ in 1875²¹ (which provided, among several other miscellaneous things, that "an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute, between employers and workmen shall not be indictable as a conspiracy if such act, committed by one person would not

Sampson respecting it, in Yates Select Cases pp. 164, 211, 212."

15. Trial of Boot & Shoe Makers of Philadelphia (1806), Journeymen Cordwainers of Pittsburg, Printed at Pittsburgh in 1811, Philadelphia Journeymen Tailors' Case, Philadelphia 1827; People v. Melvin, 2 Wheeler's Crim Cas 262, 1 Yates Sel Cas 114 (1810) (In re Journeymen Cordwainers), People v. Fisher, 14 Wend NY 909, 28 Am Dec 501 (1835), People v. Trequier, 1 Wheeler's Crim Cas 142 (1823). See also Cote v Murphy, 159 Pa St 419, 28 A 190 (1894). See Witte, Early American Labor Cases (1926), 35 Yale L Jour 825, People v. Melvin, (supra), though often cited in support of the proposition that labor unions were illegⁿ under the early American common law, really does not so hold, the court expressly stating that the question was not necessary to be decided to support the holding of the case.

While the early American cases holding or declaring labor unions to be illegal are found only in New York and Pennsylvania, later cases in other jurisdictions assumed labor

unions to be illegal under the early American law. See State v Donaldson, 32 NJL 151 (1867); Mayer v Journeymen Stonecutters Ass'n, 47 NJ Eq 519, 20 A 492 (1890), Cumberland Glass Mfg Co v Glass Bottle Blowers Ass'n, 59 NJ Eq 49 46 A 208 (1899); Everett Waddey Co v. Richmond Typographical Union, 105 Va 188, 53 SE 273 (1906).

16. 6 Geo IV c 129, amending St 5 Geo IV, c 95, Sec 2 (1824).

17. 39 Geo 3, c. 81, 40 Geo 3, c. 106.

18. 34 & 35 Vict c 31 (known as The Trade Union Act of 1871).

19. Hilton v Eckersley, 6 El & Bl 47, 2 Jur NS 587, 25 LJQB 199, 4 WR 326, 119 Eng Rep 781 (1856). Hornby v Close, LR 2 QB 153, 36 LJMC 43 [1867], Farrar v. Close LR 4 QB 602, 38 LJMC 132 [1869]. Old v. Robson, 54 JP 597, 59 LJ Mag Cas NS 41, [1890]; Mullet v. United French Polishers London Soc 91 LT Rep NS 133 [1904].

20. Hornby v Close, LR 2 QB 153 [1867]. See also Rigby v Connell, LR 14 Ch Div 482, 49 LJ Ch 328, 48 LT 139 [1880].

21. 38 & 39 Vict c. 86 (1875).

be punishable as a crime"), and in 1906²² (which exempted labor unions from the doctrine of civil conspiracy). In America, the lawfulness of labor unions was early established either by statute or, more often by judicial decisions, of which *Commonwealth v. Hunt*²³ is one of the earliest and certainly the most outstanding. That case is so important in the history of labor law because it recognized an area of economic conflict within which combinations could exist without colliding with the doctrine of criminal conspiracy. The dimensions of that area, which were left undefined in the Hunt case, is one of the most significant chapters in labor law. The recognition of that area as a field of insulation in connection with the other legal sanctions heretofore considered, is another significant chapter.

Statutes favoring labor unions usually take the form of an outright grant of legality,²⁴ or else are found as an exception to enactments directed against criminal conspiracy²⁵ or contracts and combinations in restraint of trade²⁶. Judicial decisions also take three main forms. First, it is held that labor unions do not come within the purview of statutes governing contracts and combinations in restraint of trade, because not dealing with commodities but with human labor,²⁷ or that labor unions, though coming within

22. 6 Edw VII, c 47 (1906). For an elaborate analysis of English labor legislation see Rothschild Government Regulation of Trade Unions in Great Britain (1938) 38 Col L Rev 1, 1335.

23. 4 Met (Mass) 11, 38 Am Dec 346 (1812).

24. See section 455, *infra*.

25. See section 455, *infra*.

26. See section 456, *infra*.

27. *Rohlf v. Kasemeier*, 140 Iowa 182, 118 NW 276, 23 LRA(NS) 1294, 132 Am St Rep 261, 17 Ann Cas 750 (1909) (involving a combination among physicians) where *The Danbury Hatters* case (*Loewe v. Lawlor*, 208 US 274, 28 S Ct 309, 52 L Ed 488, 13 Ann Cas 815 [1908]) where-

in the United States Supreme Court held labor unions subject to the Sherman Act, is distinguished upon the ground that in that case the acts done were calculated to destroy the plaintiff's business, and hence impinged upon trade and commerce. See, also, *State v. Duluth Bd of Trade*, 107 Minn 506, 121 NW 395 (1909); *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 F 259 (CCA 2, 1909). *Contra* *Campbell v. Motion P. M. O. U.*, 151 Minn 320, 186 NW 781 (1922). It should be emphasized that we are dealing here with the legality of labor unions *per se*, as distinguished from their external activities, or their internal rules and regulations. It has been

the intendment of the anti-trust laws, are legal because constituting reasonable restraints of trade,²⁹ unless either the membership agreement or the acts done by the union are unreasonable.³⁰ Second, it is decided that common law and statutory conspiracy are inapplicable to the legitimate associations of men formed for the purpose of bettering the conditions under which they labor.³⁰ Third, it is reasoned that labor unions are simply associations of men formed for purposes of self-betterment,³¹ and thus reflect the right of men to associate which, according to one case, is a constitutional right.³² In some cases the reason for the legality of labor unions was found in an analogy to the right of capital to organize,³³ while in other cases the analogy pointed to

held that an anti-trust statute is violated by a labor union rule forbidding members to work for employers who fail to observe another rule providing for a minimum price at which employers may sell their products. *Standard Engraving Co. v. Volz*, 200 AD 758, 193 NYS 831 (1922). Likewise, where union members are forbidden to accept employment, in establishments where there are employed non-union employees or members not in good standing in the union. *Froehch v. Musicians Mut. Ben. Asso.* 93 Mo App 383 (1902). See sections 187 to 192, 422 *infra*, for a discussion of the application of the Sherman Anti-Trust Act to labor unions.

²⁹ *Cameron v. International Alliance*, 119 NJ Eq 577, 183 A 157 (1935), cert den 298 US 659, 56 S Ct 681, 80 L Ed 1385 (1936).

³⁰ See *Lawlor v. Loewe*, 235 US 522, 35 S Ct 170, 59 L Ed 341 (1915); *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Assn.* 274 US 37, 47 S Ct 522, 71 L Ed 916, 54 ALR 791 (1927); *Duplex Printing Press Co. v. Deering*, 254 US 443, 41 S Ct 172, 65 L Ed 340, 16 ALR 196 (1921); *Local 167 Int'l Bro. of Teamsters v. United States*, 291 US

293, 54 S Ct 396, 78 L Ed 804 (1934). For cases involving the Sherman Act see sections 187-192, 421, for state anti-trust legislation, see sections 455-466, *infra*.

³⁰ See *Commonwealth v. Hunt*, 4 Met (Mass) 11, 38 Am Dec 346 (1842). Most of the cases dealing with the legality of trade unions proceed upon this theory.

³¹ *United States v. Moore*, 129 F 630 (CCND Ala SD 1904); *Southern R. Co. v. Machinists Local Union*, 111 F 49 (CCWD Tenn 1901); *Jacobs v. Cohen*, 183 NY 207, 76 NE 5 (1905); *Citizens Co. v. Asheville Typographical Union*, 187 NC 42, 121 SE 31 (1924).

³² *Pickett v. Walsh*, 192 Mass 572, 78 NE 753, 6 LRA(NS) 1067, 116 Am St Rep 272, 7 Ann Cas 638 (1906). See also *Alaska S. S. Co. v. Int'l Longshoremen Ass'n*, 236 F 964 (DCWD Wash 1916).

³³ *Kemp v. Division No. 241*, 255 Ill 213, 99 NE 389, Ann Cas 1913D 347 (1912), rev'g 153 Ill App 344 (1910); *People v. Franklin Union*, 220 Ill 355, 77 NE 176 (1906); *Beaton v. Tarrant*, 102 Ill App 124 (1902); *Vegelahn v. Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722, 57 Am St Rep 443 (1896). See also

was the right of stockholders and officers to organize.³⁴ In *Gompers v. Buck's Stove & Range Company*,³⁵ the basis of the right to form and join labor organizations was thus explained: "Society itself is an organization, and does not object to organization for social, religious, business, and all legal purposes. The law, therefore, recognizes the right of workingmen to unite and to invite others to join their ranks, thereby making available the strength, influence, and power that come from such association." Finally, it has been said that unions are not subject to monopoly legislation where all competent men in the trade or industry are eligible for membership in the union.³⁶ The notion of inequality of bargaining power as the justifying feature is sometimes dimly perceived, at other times implied, while at still other times clearly expressed.

Section 61. Legality of Labor Unions—Purposes for Which Labor Unions May Be Formed.

Combinations of labor have everywhere been held lawful where formed to maintain or advance the rate of wages, or to secure reduction in the hours of employment, or generally to improve the members' working conditions.³⁷ It

Ames v. Union Pac. Rwy. Co. 62 F 7 (CCD Neb 1894); *Citizens Co. v. Asheville Typographical Union*, 187 NC 42 121 SE 31 (1924).

34 *Alaska S. S. Co. v. Int'l Longshoremen's Assn.* 236 F 964 (DCWD Wash 1916); *Ames v. Union Pac Ry* 62 F 7 (CCD Neb 1894).

35 221 US 418, 31 S Ct 402, 55 L Ed 797 (1911).

36 *National Fireproofing Co. v. Mason Builders' Assn.* 169 F 259 (CCA 2, 1909) The court reasoned as follows " . . . the thing which is essential to the existence of a monopoly—the concentration of business in the hands of a few—is not present here. The business of installing fireproofing in the City of New York is open to all who choose to engage in it under existing eco-
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nomic conditions. General contractors cannot be said to have a monopoly when any person can be a general contractor. Members of the unions cannot be said to be monopolists when any qualified bricklayer can join a union."

37. *United States.—Texas & N. O. R. Co. v. Brotherhood Ry & S. S. Clerks*, 281 US 548, 50 S Ct 427, 74 L Ed 1034, 27 ALR 360 (1929); *American Steel Foundries v. Tri-City Central Trades Council*, 257 US 184, 42 S Ct 72, 66 L Ed 180 (1921); *Pennsylvania Mining Co. v. United Min Workers of America*, 28 F(2d) 851 (CCA 9, 1928), cert den. 279 US 841, 49 S Ct 263, 73 L Ed 987 (1929); *El Paso Electric Co. v. Elliott*, 15 F Supp 81 (DCWD Tex El Paso 1936); *Tri-Plex Shoe Co. v.*

has been held that organizing of men on strike into a labor

Cantor, 25 F Supp 996 (DCED Pa 1939); **Wabash R. Co. v. Hannahan**, 121 F 563 (CCED Mo 1903); **Ames v. Union Pac. Ry. Co.** 62 F 714 (CCA Neb 1894).

Alabama.—**Hardie-Tynes Mfg. Co. v. Cruse**, 189 Ala 66, 66 So 657 (1914); **Welch v. State**, 183 S 879 (Ala App 1938), cert. den. 236 Ala 577, 183 S 886 (1938)

Arizona.—**Truax v. Bisbee Local**, 19 Ariz 379, 171 P 121 (1918).

Arkansas.—**Meier v. Speer**, 96 Ark 618, 132 SW 988 (1910); **Local Union v. Stathakis**, 135 Ark 86, 205 SW 450, 6 ALR 894 (1918).

California. — **Jordahl v. Hayda**, 1 Cal App 696, 82 P 1079 (1905)

Colorado—**People v. Harris**, 104 Colo 386, 91 P(2d) 989, 122 ALR 1034 (1939).

Connecticut. — **State v. Glidden**, 65 Conn 46, 8 A 890, 3 Am St Rep 23 (1886).

Florida. — **Paramount Enterprises v. Mitchell**, 104 Fla 407, 140 S 328 (1932)

Idaho—**Franklin Union v. People**, 220 Ill 355, 77 NE 176 (1906).

Illinois. — **Carpenters' Union v. Citizens' Committee to Enforce Landis Award**, 333 Ill 225, 164 NE 393, 63 ALR 157 (1928) **Ulery v. Chicago Live Stock Exch.** 54 Ill App 233 (1894).

Indiana.—**Karges Furniture Co v Amalgamated Woodworkers Local Union**, 165 Ind 421, 75 NE 877 (1905).

Iowa.—**Rohlf v. Kasemeier** 140 Iowa 182, 118 NW 277, 17 Ann Cas 750, 23 LRA(NS) 1284, 132 Am St Rep 261 (1908).

Kentucky.—**Diamond Block Coal Co. v. United Mine Workers of America**, 186 Ky 477, 222 SW 1079 (1920).

Maryland. — **International Pock-**

etbook Workers Union v. Orlove, 158 Md 496, 148 A 826 (1930); **My Maryland Lodge v. Adt**, 100 Md 238, 59 A 721 (1905)

Massachusetts.—**Snow v. Wheeler**, 113 Mass 179 (1873); **Olympia Operating Co. v. Costello**, 278 Mass 125, 179 NE 804 (1932).

Michigan.—**Beck v. Ry Teamsters Protective Union**, 118 Mich 497, 77 NW 13, 42 LRA 407, 74 Am St Rep 421 (1898)

Minnesota. — **Gray v. Building Trades Council**, 91 Minn 171, 97 NW 663 (1903)

Missouri.—**Lohse Patent Door Co. v. Fuelle**, 215 Mo 421, 114 SW 997, 22 LRA(NS) 607, 128 Am St Rep 492 (1908)

Montana.—**Lindsay & Co v Montana Fed. of Labor**, 37 Mont 264, 96 P 127 (1908); **Empire Theatre Co v Cloke**, 53 Mont 183, 163 P 107, LRA 1917E, 383 (1917)

New Jersey.—**Cameron v. International Alliance**, 118 NJ Eq 11, 176 A 692, 97 ALR 594 (1935); **Bayonne Textile Corporation v. American Federation of Silk Workers**, 116 NJ Eq 146, 172 A 551, 92 ALR 1450 (1934), modifying 114 NJ Eq 307, 168 A 799 (1933); **New Jersey Painting Co. v. Local No 26 96 NJ Eq 632 126 A 399 (1924)**, rev 95 NJ Eq 108, 122 A 622 (1923) "It would indeed be anomalous if society, itself an organization that fosters association for the achievement of a common objective in every conceivable field of endeavor, if not contrary to positive law or inimical to the public welfare, should bar the union of work-ingmen. The law, therefore, recognizes the right of workmen to unite and to invite others to join their ranks, thereby making available the strength, influence and power that come from such association" Bay-

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organization is legal.³⁸ Cases are to be found which declare many other purposes to be permissible, but, as heretofore stated, the declarations were unnecessary to the case because few decisions have dealt with the legality of labor combinations, the great number of cases having to do with the legality of labor activities instead. Purposes passed upon by the courts as permissible are: to gather a strike fund,³⁹ to provide assistance for members in time of need,⁴⁰ or generally to improve employer-employee relationships.⁴¹

onne Textile Corporation v. American Federation of Silk Workers (supra)

New York.—*Rusch Jewelry Co v. United Retail Employees Union*, 281 NY 150, 22 NE(2d) 320, 124 ALR 744 (1939), *Stillwell Theatre v. Kaplan*, 259 NY 403, 182 NE 63, 84 ALR 6 (1932), rehearing denied 260 NY 563 184 NE 93, 84 ALR 12 (1932), cert. den. 288 US 606, 53 S Ct 397, 77 L Ed 981 (1932); *Auburn Draying Co. v. Wardell*, 227 NY 1, 124 NE 97 (1919)

North Carolina.—*Citizens Co. v. Asheville Typographical Union*, 187 NC 42, 121 SE 31 (1924).

Ohio.—*Fulworth Garment Co. v. I. L. G. W. U.* 15 Ohio NP(NS) 353

Oklahoma.—*Ex parte Sweitzer*, 13 Okla. Crim. Rep. 154, 162 P 1134 (1917)

Oregon.—*Wallace v. International Assn. of Mechanics*, 155 Or 652, 63 P (2d) 1090 (1936); *Blumauer v. Portland M. P. M. O. U.* 141 Or 399, 17 P(2d) 1115 (1933); *Crouch v. Central Labor Council*, 134 Or 612, 293 P 729, 83 ALR 193 (1930); *Longshore Printing Co. v. Howell*, 26 Or 527, 38 P 547 (1894).

Pennsylvania.—*Kirmse v. Adler*, 311 Pa 78, 166 A 566 (1933); *Jefferson & Indiana Coal Co. v. Marks*, 287 Pa 171, 134 A 430, 47 ALR 745 (1926); *Cote v. Murphy*, 150 Pa 420, 28 A 190 (1894).

Tennessee.—*Powers v. Journeyman*

Bricklayers' Union, 130 Tenn 643, 172 SW 284 (1914).

Texas.—*Henke & Pilot, Inc. v. Amalgamated Meat Cutters*, 109 SW (2d) 1083 (Tex. Civ. App. 1937)

Vermont.—*State v. Stewart*, 59 Vt 273, 9 A 559 (1887)

Virginia.—*Cole v. Commonwealth*, 169 Va 808 193 SE 517 (1937), *Everett Waddey Co. v. Richmond Typographical Union*, 105 Va 188, 53 SE 273 (1906)

38 Pennsylvania Mining Co. v. United Mine Workers of America, 28 F(2d) 851 (CCA 8, 1928), cert. den. 279 US 841, 49 S Ct 261, 73 L Ed 987 (1929).

39 Thomas v. Cincinnati etc R Co 62 F 803 (CCA 2, 1933); *Brotherhood of Railroad Trainmen v. Barnhill*, 214 Ala 565, 108 S 456, 47 ALR 270 (1926). It is also legal for a labor union to accumulate a fund for its unemployed members. See *Hitchman Coal Co. v. Mitchell*, 172 F 963 (CCAND W Va 1909).

40 Com. v. Hunt, 4 Met (Mass) 111, 129, 38 Am Dec 346 (1842), *Parker v. Bricklayers Union*, 21 WLB 223, 10 Ohio Dec 458 (1899), *Brotherhood of Railroad Trainmen v. Barnhill*, 214 Ala 565, 108 So 456 (1926).

41 National Protective Ass'n v. Cumming, 170 NY 315, 63 NE 369, 58 LRA 135, 88 Am St Rep 648 (1902); *Auburn Draying Co. v. Wardell*, 227 NY 1, 124 NE 97, 6 ALR

But it has been held that a labor union is illegal which has as its purpose the gaining of control over a business in the hands of a receiver.⁴² It has also been held that the state may, by its proper officer or body, refuse incorporation to a labor union applying for incorporation under the state statute, where there is evidence that the union is company dominated and that the employer was exercising coercion in the formation of the company union, all in violation of the State Labor Relations Act.⁴³ In *Hagan v. Picard*⁴⁴ it was held that public employees (members of the "Greater New York Park Employees Association") desirous of incorporating had a right to do so notwithstanding that they were public employees, and that a contrary determination by the Board of Standards and Appeals must be annulled. The court said: "I find nothing in the statute which renders unlawful the organization of public employees for their mutual welfare and benefit. They have the same right to mutual help and assistance that other citizens have—and to group themselves together for that purpose."

Cases are to be found which state in general terms that the right of combination is limited by the right of others not to be harmed thereby,⁴⁵ but there are cases, upon the other hand, which hold harm to be *damnum absque injuria*, where labor unions are engaged at the time of the infliction of the harm in seeking to accomplish a lawful object.⁴⁶

901 (1919), *Crouch v. Central Labor Council*, 134 Or 612, 293 P 729, 83 ALR 193 (1930)

42. *United States v. Weber*, 114 F 950 (DCWD Va 1902).

43. *Campbell v. Picard*, 165 Misc 148, 300 NYS 515 (1937) c/f *Breen v. Picard*, 167 Misc 561, 4 NYS(2d) 301 (1938).

44. 171 Misc 475, 12 NYS(2d) 873 (1939) aff'd 258 AD 771, 11 NYS(2d) 706 (1939). See *In re Independent Garment Workers Union*, 335 Pa 209, 6 A(2d) 775 (1939). In England, the *Trade Disputes and Trade Union Act of 1927* (17 and 18 Geo V, c. 22) forbids local or public author-

ities from making trade union membership a condition of employment

45. *Barnes & Co v. Chi Typographical Union*, 232 Ill 424 83 NE 940, 14 LRA(NS) 1018, 13 Ann Cas 54 (1908); *Curran v. Galen*, 152 NY 33, 46 NE 207 (1897); *Lucke v. Clothing Cutters & Trimmers' Assembly*, 77 Md 396, 26 A 505 (1893); *Parker v. Stablemen's Union*, 103 P 324 (Cal 1909). See also *Bossert v. United Brotherhood of Carpenters & Joiners of America*, 77 Misc 592, 137 NY Supp 321 (1912)

46. *National Fireproofing Co v. Mason Builders Ass'n*, 169 F 259 26 LRA(NS) 148, 94 CCA 535

This, of course, is all very vague. It indicates, however, not that the judiciary has been unequal to the task of measuring with accurate tools the legality of labor unions but rather that few cases hold labor unions specifically illegal; whatever authority exists in connection with illegality deals not with labor unions but with what they seek to accomplish, in what manner and by what means.

Section 62. Legality of Labor Unions—Sources Examined to Determine Legality.

The constitution, by-laws and rules adopted by a labor union, in the light of the purposes announced by those documents, determine its legality.⁴⁷ Predominating unlawful purposes make a labor union wholly illegal even though lawful purposes are also set forth in the papers which govern its activities, and illegality results also where separation of the lawful from the unlawful purpose is impossible or impracticable, but the contrary is true where the illegal purposes are merely incidental.⁴⁸

The constitution, by-laws and rules of a labor organiza-

(CCA 2, 1909); *State v. Stockford*, 77 Conn 227, 58 A 769 (1904); *Karges Furniture Co. v. Amalgamated Woodworkers' Local Union*, 165 Ind 421, 75 NE 877 (1905).

47. *Hitchman Coal & Coke Co. v. Hitchman*, 202 F 512 (1912), rev'd on other grounds 214 F 685 (1914) rev'd 245 US 229, 38 S Ct 65, 62 L Ed 260, LRA1918C, 197, Ann Cas 1918B, 461 (1917); *Barker Painting Co. v. Brotherhood of Painters*, 12 F (2d) 945 (DCD NJ 1926), aff'd 34 F(2d) 3 (CCA 3, 1929), 281 US 462, 50 S Ct 356, 74 L Ed 967 (1929), 15 F(2d) 16 (CCA 3, 1926), 23 F (2d) 743 (CA DC 1927); *New Jersey Painting Co. v. Local No. 26*, 96 NJ Eq 332, 126 A 399 (1924), rev'g 95 NJ Eq 108, 122 A 622 (1923); *Rhodes Bros. Co. v. Musicians Protective Union*, 37 RI 281, 92 A 641 (1915); *Amalgamated Clothing Workers of America v. Kiser*, 6 SE 158

(2d) 562, 125 ALR 1251 (Va 1939). See also *Russel v. Amalgamated Society of Carpenters & Joiners* [1912] AC 421; *Thomas v. Portsmouth Ship Construction Ass'n*, 28 TLR 372 [1912]; *Osborne v. Amalgamated Soc.* [1911] 1 Ch 540, 27 LTR 289. In *J. Friedman & Co. v. Amalgamated Clothing Workers*, 115 Misc 44, 188 NYS 879 (1921), the following statement contained in the preamble to the union's constitution was held not to render illegal the purpose for which the union was formed: "The industrial and interindustrial organization, built upon the solid rock of clear knowledge and class consciousness, will put the organized working class in actual control of the system of production, and the working class will then be ready to take possession of it."

48. *Tracey v. Banker*, 170 Mass 284, 49 NE 308, 39 LRA 508 (1898).

tion are likewise the source of the organization's authority. Thus in *Amalgamated Clothing Workers of America v. Kiser*,⁴⁹ a labor union was held without authority, because its constitution did not give it such authority, to enter into a contract with a prospective member under the terms of which it agreed to pay her the salary she was earning at the time of her discharge, in the event of her discharge for joining the union.⁵⁰

Likewise, the constitution, by-laws and rules constitute not only the contract between the labor union and its members but also the contract between the members and other members of the union.⁵¹

Questions relating to the property, funds and internal administration of labor unions raise no problems peculiar to such unions. Solutions to such problems are governed by the general rules applicable to incorporated or unincorporated associations, which are beyond the scope of this work.⁵² Upon schism in or dissolution of a labor union, neither the majority nor the minority factions are entitled, exclusive of the other faction, to the property or

49. 6 SE(2d) 502, 125 ALR 1251 (Va 1939)

50. The correctness of the decision is doubtful. See Rest., Torts (1939) section 798, stating the rule to be that employees may legally induce workers (i. e., non-employees) by fair persuasion to withhold their services from the employer, and adding that "Fair persuasion of workers may be accompanied by offers of strike benefits to them, that is, offers of money or sustenance during their strike or other withholding of services." Consider also cases (supra at section 61) holding that the accumulation of a strike fund is a proper function of labor unions. See also *Everett-Weddey Co. v. Richmond Typographical Union*, 103 Va 188, 53 SE 273, 5 LRA(NS) 792, 8 Ann Cas 798 (1906). Payment of strike benefits in connection with a legal strike

is unenjoinable *Barnes v. Berry*, 157 F 883 (CC SD Ohio 1908), aff'd 169 F 225, 94 CCA 501 (CCA 6, 1909), *Bittner v. West Virginia-Pittsburg Coal Co* 214 F 716, 131 CCA 22 (CCA 4, 1914), *Levy v. Rosenstein*, 66 NYS 101 (1900), aff'd 56 AD 618, 67 NYS 630 (1900).

51. *Brotherhood of Railroad Trainmen v. Barnhill*, 214 Ala 565, 108 S 456, 47 ALR 270 (1926), *Cameron v. Int'l Alliance*, 119 NJ Eq 577, 183 A 157 (1930), *Bradley v. Wilson*, 138 Va 605, 123 SE 273 (1924); *Amalgamated Clothing Workers of America v. Kiser*, 6 SE(2d) 502, 125 ALR 1251 (Va 1939).

52. See *infra*, section 100, for a discussion of the nature and extent of judicial interference with labor unions, and other material on the internal administration of labor unions.

funds of the association or corporation; the funds and property must be equally divided.⁵³ Nor can a majority group which secedes from the union take the funds of the union with them.⁵⁴ A local union which joins a national labor organization is entitled to its own property and funds free of any claims of the national organization, upon severance of connection by the local with the national,⁵⁵ but the local union is bound by the terms contained in the charter under which it accepts membership in the national.⁵⁶ It has been held that a fund raised for the construction of a labor temple by a local association while affiliated with the American Federation of Labor is lost to the local upon revocation of its charter, and becomes the property of a local granted a charter by the Federation to act as successor of the first local.⁵⁷

Section 63. Legality of Labor Unions—Importance of Determining Whether Given Organization Is a Labor Union.

The analysis heretofore made of labor combinations, in connection with their historical background, social implications and legal status, indicates that labor unions have sought and obtained special treatment in the forms of numerous rights, privileges and immunities. The discussion of the legality of labor activities which will follow hereafter in this work will serve to emphasize the extent of this special treatment. Because of the existence of this special treatment in behalf of labor unions, organizations of entrepreneurs of one kind or another have sought to assume the cloak of a labor union, so as thereby to take ad-

53. *Equity Lodge v. McDonald*, 8 East LR 421 (1910); *Schweitzer v. Schneider*, 86 NJ Eq 88, 97 A 159 (1916), *aff'd* in 86 NJ Eq 256, 98 A 1086 (1916). See also *Farrell v. Cook*, 33 NY St Rep. 1003, 11 NYS 326 (1890); *Farrell v. Dalzell*, 5 NYS 729 (1899).

54. *O'Neill v. Delaney*, 158 NYS 665 (1908). See, in this connection, *Brownfield v. Simon*, 94 Misc 720, 160

168 NYS 187 (1916), *aff'd* 174 AD 872 (1916).

55. *Grand Lodge v. Reba*, 97 Conn 235, 116 A 235 (1922) *c/f* *Brotherhood of R. Trainmen v. Williams*, 211 Ky 638, 277 SW 500 (1925).

56. *Local Union v. United Brotherhood*, 143 La 901, 79 S 532 (1918).

57. *Centralia Labor Temple Ass'n v. O'Day*, 246 P 930 (Wash 1926).

vantage of this bundle of rights, privileges and immunities. This has been done in one of three main ways. The first has taken the form of a frank entrepreneur association claiming privileges usually accorded only to labor unions.⁵⁸

The second has taken the alternative form either of an organization bearing a name more or less designed to induce the belief that the organization is a labor union, or of an organization utilizing the terms usually employed by labor unions in connection with labor disputes (such as "strike" or "picket") the purpose thereof apparently being to secure labor rights by the psychology of identification. *Paramount Pictures, Inc. v. United Motion Picture Theatre Owners*⁵⁹ is a case in point. In that case an association of independent motion picture theatre owners sought to secure better terms in contracts with the plaintiff, Paramount Pictures, Inc. To accomplish this purpose, the association determined upon concerted refusal to deal with the plaintiff and sought also to enlist the public's support in the form of refusal by the public to patronize theatres playing pictures produced by the plaintiff. The association declared a "strike" against the plaintiff, terming the concerted refusal to deal with the plaintiff a "sit-down strike." Exhibitors were sent notices informing them that "any exhibitor who signs a contract in violation of the buying strike should be picketed, as well as anyone who, without proper dispensation of the War Board, does not join in the August date strike." The association's elaborate "picketing campaign" included "picketing from the sky for the first time in the history of aviation." The whole plan was a patent violation of the Sherman Anti-Trust Act, and the court so held.

The third, which is the most subtle, has been sought to be accomplished by having the entrepreneurs join a labor

58. See *Rosman v. United Strictly Kosher Butchers*, 183 Misc 331, 298 NYS 343 (1937) where a Kosher Butchers Association was permitted to inform the public through the medium of picketing, that the proprietor picketed was selling kosher chickens and advertising the same, as

[1 Teller]—11

a means of deluding unwary purchasers into the belief that the meat sold by him was kosher as well. See also *Individual Retail Store Owners Association v. Penn Treaty Food Stores Ass'n*, 33 Pa D & C 108 (1938).

59. 93 F(2d) 714 (CCA 3, 1937).

organization. Strikes, picketing and boycotting, as well as so-called collective bargaining agreements establishing the equivalent of closed shops are then undertaken by the entrepreneurs in the name of the labor union. Labor unions which lend themselves to such practices thereby destroy much of whatever freedom of enterprise exists in modern society. The practice is a vicious one because it prevents new business enterprise from entering the field, and constitutes an unwarranted restriction of the market in a competitive society. In *People v. Distributors Division, Smoked Fish Workers' Union*,⁶⁰ a proceeding was brought by the state to enjoin the defendant "Distributors Division" among other things from compelling retail storekeepers to purchase their supply solely from its members, or from picketing and threatening to picket the places of business of such producers and retailers who failed to comply with its demands. The defendants, members of the so-called "Distributors Division" of the union, claimed immunity because, as part of a labor union, they could do that which labor unions could do. But the court pierced the illegal scheme and granted the injunction. Said the court: "The evidence . . . convinces me that the Distributors Division is not a bona fide union of laborers or workmen, but merely an aggregation that has taken on the guise and nomenclature of a union in order to obtain an immunity to carry on its activities as an illegal combination to restrain trade and create a monopoly. . . . The Distributors Division is a typical jobbers association. It is not interested in the classical purposes of a labor union, namely, furthering the interest of the worker with respect to higher wages, improved labor conditions, bettering hours of labor, etc. Its interest lay solely in striving to obtain more retail trade or customers for its members so as to increase their profits."

The question as to whether a given organization constitutes a labor union also becomes important in connection with the National Labor Relations Act and prototype State

legislation. The Act defines a "labor organization" to mean "any organization of any kind, or any agency or employees' representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."⁶¹ Only labor organizations may petition for an election under the act,⁶² and an employer's domination over or interference with an employees' organization may be held to constitute an "unfair labor practice" under the act only where the employees' organization comes within the purview of the term "labor organization" as defined by the Act. While many kinds of employees' organizations, though not called labor organizations, have been held to be labor organizations under the Act,⁶³ the Board has held that a social club not involving the payment of dues, to which not only the employees belonged, but also their wives and children, is not a labor organization under the Act.⁶⁴

Section 64. Legality of Labor Unions—Nature of Workingmen's Right to Associate.

The view presently entertained by the law books, in connection with the employee's right to form and join labor unions, seems to be that workingmen should have a right to organize so that the unequal employer-employee bargaining situation might thereby be equalized, and that

61. 49 Stat 450, 29 USCA Sec 152 (5) (1935).

62. Employers may petition in the one case where two bona fide labor organizations claim a majority of the employers' employees. See *infra*, Section 385.

63. See *Tiny Town Togs, Inc* 7 NLRB 64 (1938); *Wheeling Steel Corporation*, 1 NLRB 690 (1936) enforced 94 F(2d) 1021 (CCA 6, 1938); *International Harvester Co.*, 2 NLRB 310 (1936); *Clinton Cotton Mills*, 1 NLRB 97 (1936) enforced 91 F

(2d) 1008 (CCA 4, 1937); *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1 (1935) *aff'd* 303 US 261, 58 S Ct 571, 82 L Ed 831 (1938); *Atlas Bldg. & Burlap Co.*, 1 NLRB 292 (1936); *Oregon Worsted Co.*, 1 NLRB 915 (1936) enforced 96 F(2d) 193 (CCA 9, 1938); *Union Drawn Steel Co.*, 10 NLRB 863, enforced 109 F(2d) 587 (CCA 3, 1940); *Ford Motor Co.*, 23 NLRB No. 28 (1940).

64. *Triplett Electrical Instrument Co.*, 5 NLRB 835 (1938).

an exception for this purpose should accordingly be made to the doctrines, among others, of conspiracy and restraint of trade. In some few cases, as has been seen, the right to organize is placed upon the basis of the general right to associate,⁶⁵ but no discussion is given to the nature of that right. We have thus the situation where this so-called "right to form and join labor unions" is considered a privilege accorded by a system of law which, in the beginning, recognized no such right and consequently held all labor unions unlawful.⁶⁶ Labor unions have had to justify their existence. Nowhere is the suggestion clearly made that the right to form and join labor unions is simply one aspect of the employee's right to a free and open market. Under such a view, the right to form and join labor unions would find its source of legality not in any exception or privilege in connection with the doctrines of conspiracy or restraint of trade, but rather in a recognized substantive right—the right to a free and open market. If such be the nature of the right to form and join labor unions, the guarantees of that right contained in the National Labor Relations Act and prototype state statutes may properly be considered to be not the creation of a new workingmen's right, but rather the better protection of a previously recognized but hitherto imperfectly protected right. It will be seen that there is contained in the possibility here advanced a germ of the notion of competition as the basis of the labor movement. A more extended discussion of competition as an analogy is deferred to subsequent sections.⁶⁷

Section 65. Legality of Employers' Combinations and Associations.

Whether by analogy to the right of workingmen to associate, or upon the ground that men have a natural right to form combinations and associations, or upon the theory that many may do in combination what one may do singly, it is the law throughout the United States that employers'

^{65.} See *supra*, section 60.

^{67.} See Sections 73, 75, *infra*.

^{66.} See *supra*, section 60.

combinations or associations are legal,⁶⁸ unless the nature of the agreement associating the employers, or the activities of the combinations or associations, bring them within the vice of common law rules against monopoly or conspiracies, or place them within the purview of anti-trust laws or other legislative enactments, such as the National Labor Relations Act. The general subject of trade associations and trade agreements are not within the scope of this work.⁶⁹ However, the legality of employers' associa-

68. United States.—*Boyer v Western Union Tel Co* 124 F 246 (CC ED Mo 1903). *Knudson v Benn*, 123 F 636 (CCD Minn 1903). *Goldfield Cons Mines Co v Goldfield Miners' Union*, 159 F 500 (CCD Nev 1908)

California.—See *Dyer Bros Golden West Iron Works v Central Iron Works*, 182 Cal 588, 189 P 445 (1920)

Connecticut.—*Associated Hat Mfrs v Baird Unteidt Co* 88 Conn 332, 91 A 373 (1914)

Georgia.—See *Lambert v Georgia Power Co* 181 Ga 621, 183 NE 814 (1936). *Woodruff v Hughes*, 2 Ga App 361, 58 SE 551 (1907)

Illinois.—*A J Lindemann, etc Co v Advance Stove Works*, 170 Ill App 423 (1912). See also *Carpenters Union v Citizens Committee*, 333 Ill 225, 164 NE 393 (1928)

Indiana.—See *Androff v Building Trade Employers' Assn* 83 Ind App 294, 148 NE 203 (1925).

Iowa.—See *Employment Bureau of Des Moines v State Employment Agency Commission*, 209 Iowa 1046, 229 NW 677 (1930).

Kentucky.—See *Baker v Metropolitan Life Ins. Co* 23 Ky L 1174, 64 SW 913 (1901). *Trimble v Prudential Life Ins. Co*, 23 Ky L 1184, 64 SW 915 (1901).

Maryland.—*Willner v. Silverman*,

109 Md 341, 71 A 902, 24 LRA(NS) 895 (1909)

Michigan.—*Beck v. Ry Teamsters Protective Union*, 118 Mich 407, 77 NW 13 42 LRA 407, 74 Am St Rep 421 (1898)

Nebraska.—*State v Employers of Labor*, 102 Neb 768, 169 NW 717, 170 NW 185 (1918).

New Jersey.—*Atkins v W A Fletcher Co* 65 NJ Eq 658, 55 A 1074 (1903). *Forstmann v United Front*, 133 A 202 (NJ Eq 1926)

New York.—See *Goldman v Senger & K. Co*, 165 NYS 394 (1917); *McCord v Thompson-Starrett Co* 112 NYS (1908), 129 AD 130 113 NYS 385 (1908), 198 NY 587, 92 NE 1090 (1910)

Ohio.—*New York, etc R Co v. Schaffer*, 65 Ohio St 414, 62 NE 1036, 62 LRA 931, 87 Am St Rep 628 (1901)

Pennsylvania.—*Cote v Murphy*, 159 Pa 420, 28 A 190, 23 LRA 135, 74 Am St Rep 421 (1898).

South Carolina.—*Rhodes v. Granby Cotton Mills*, 87 SC 18, 68 SE 824 (1919)

Wisconsin.—*Trade Press Pub. Co. v. Milwaukee Typographical Union*, 180 Wis 449, 193 NW 507 (1923)

69. See *Toulmin, Trade Agreements and the Anti-Trust Laws* (Cincinnati 1937); *Kirsh, Trade Associations in Law and Business* (New York 1938).

tions or combinations and the lawfulness of their activities are touched upon in various connections. These include the legality of (1) employers' blacklist combinations;⁷⁰ (2) employers combinations to lock out their employees;⁷¹ (3) trade boycotts at common law⁷² and under anti-trust legislation;⁷³ (4) employers' combinations to procure the discharge of employees employed under an at-will employment agreement;⁷⁴ (5) agreements of employers' associations in conjunction with labor unions for establishment of the closed shop;⁷⁵ (6) agreements among employers to deal collectively and not individually with a labor union, in the light of the National and prototype Labor Relations Acts.⁷⁶ It has been held that a combination among employers formed for the purpose of maintaining open shop conditions in the industry is legal,⁷⁷ and that such a combination is not illegal under the Sherman Anti-Trust Act.⁷⁸ But the illegality of such a combination, in connection with the National or prototype Labor Relations Act, is clear, if the purpose of such combination is to resist collective bargaining.⁷⁹

Section 66. Legality of Labor Activity.

No generality concerning the legality of labor activity can be made corresponding to the legality of labor combinations. It is the settled jurisprudence governing American judicial labor law that the permissible subjects of labor activity are matters for the courts to determine in each instance, and many are the subjects which have upon this underlying notion been declared unlawful.⁸⁰ That labor

70. See *infra*, section 472.

71. See *infra*, section 83.

72. See *infra*, sections 144, 191.

73. See *infra*, section 191.

74. See *supra*, section 12.

75. See *infra*, section 170.

76. See *infra*, sections 384, 476.

77. See *State v. Employers of Laborers*, 102 Neb 768, 169 NW 717, 170 NW 185 (1918).

78. *Associated Hat Mfgs. v. Baird Unteidt Co.* 88 Conn 352, 91 A 373 (1914).

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79. See *infra*, sections 354, 376.

80. For outstanding expressions of the law to such effect see *Dorchy v. Kansas*, 272 US 306, 47 S Ct 86, 71 L Ed 248 (1926); *W. A. Snow Iron Works v. Chadwick*, 227 Mass 382, 116 NE 801 (1917); *Bausch Mach. Tool Co. v. Hill*, 231 Mass 30, 120 NE 188 (1926); *New Jersey Painting Co. v. Local No. 26*, 95 NJ Eq 108, 122 A 622, reversed on other grounds 96 NJ Eq 632, 126 A 399 (1924).

has a right to engage in lawful labor activity is generally not denied, but the cases are divided first, in connection with the question as to whether the given type of activity is lawful, and second, in relation to the problem whether the given purpose sought to be achieved by the activity is legal. As stated in *Blumauer v. Portland Moving Picture Machine Operators' Protective Union*,⁸¹ "This right (the right to organize and form labor unions) would be of little value if they (the organizers and members of the unions) were deprived of the means of making the purpose of their organization effective. Therefore, organized labor has a right to lawfully use all lawful means to bring about reasonably desirable terms and conditions in the way of hours, pay or other conditions of employment. Organized labor has the right to present its side of a controversy to the public by all lawful means if such means may be, and are, used in a lawful manner without violence, or threats, or intimidation of the employer, his employees or the patrons of the employer's business." Sometimes the permissibility of the purposes for which labor activity is carried on is raised in connection with a strike, while at other times it is raised with respect to picketing, the boycott, a given union rule, or the consequences of a collective bargaining agreement. In this work the question of legality in relation to the purposes for which labor may carry on its activities will accordingly be considered in the respective chapters on the strike, picket or the boycott, depending upon the particular form of the labor activity involved.⁸² Consideration of the subjects of labor activity in a single chapter, regardless of the particular form in which the activity is carried on (whether strike, picket or boycott) is another way of presenting the matter. However, whatever advantages there may be in connection with this last method of presentation can be obtained by proper indexing. Courts are beginning to treat strikes differently from the manner in which they treat picketing or boycotting, while picketing,

81. 141 Or 399, 17 P(2d) 1115 (1933).

82. See *infra*, section 67, for un-

ion rules, and sections 173-176, *infra*, for the disciplinary effects of collective bargaining agreements

in turn, is considered differently from strikes and boycotts. A purpose for which a strike may be carried on, for example, is not necessarily a permissible purpose of boycotting, and picketing has been receiving radically different treatment of late in view, for example, of the identification of picketing with the right to free speech.⁸³ Again, it has been held in Maryland that boycotting is entitled to a greater measure of legal protection than is the practice of picketing, and hence that boycotting may seek legally to accomplish a purpose which, if sought to be accomplished by picketing, would be illegal.⁸⁴ Also to be mentioned as instances in point are the different rules governing secondary picketing, as distinguished from like boycotting or striking.⁸⁵ Finally, it does not seem wise to emphasize the common objects of labor activity, for a part of the story of labor law involves a tactic on the part of labor, when impressed with the futility of securing legally the accomplishment of a given object by a given form of activity, to insist upon accomplishing that same object with the permission of law, through some other form of labor activity. The sway of legal doctrine governing secondary picketing (in the direction of its legality)⁸⁶ in the face of the general prohibition against secondary boycotting⁸⁷ is an instance in point. The cases appear to be heading in the direction of a differentiation in the legality of what labor may do in connection with one kind of activity as distinguished from another, and it has been thought well to indicate such a differentiation in this work. It thus appears preferable to consider the legality of the particular purposes for which labor activity may be carried on, in connection with the given form which the given activity takes.

Because the strike was labor's first outstanding form of economic pressure, most of the cases dealing with the pro-

83. For a discussion of picketing in connection with the right to free speech, see sections 135-140, *infra*.

84. *Green v Samuelson*, 168 Md 421, 176 A 109, 99 ALR 528 (1935).

85. For the legality of the secondary strike, see *infra*, section 103; 168

secondary picketing is discussed *infra*, at sections 122 and 123, while secondary boycotting is considered *infra*, at sections 146-153.

86. See *infra*, section 123. .

87. See *infra*, section 150.

priety of the given form of pressure have arisen in connection with the strike. Economic pressure aimed at unionization, however, being a more recent purpose of labor unionism, is many times tested in connection with picketing, labor's later and at present much the more popular means of exerting that pressure.

Section 67. Legality of Labor Activity—The Restatement's Classification.

Dissatisfaction with the words "strike," "picket" and "boycott," and especially with the latter two terms, as descriptive legends to define the means adopted by labor unions to accomplish their ends, has apparently induced the writers of the Restatement of the Law of Torts to employ different terms for the several purposes. The Restatement has also refrained from using the word "secondary" in connection with any of the forms of labor activity. Labor activity is classified by the Restatement into five forms: (1) the strike;⁸⁸ (2) refusal to work on non-union goods;⁸⁹ (3) discipline by a union of its members;⁹⁰ (4) "fair persuasion;"⁹¹ and (5) withdrawal of patronage.⁹² "Fair persuasion" is meant partly to comprehend the words picketing and boycotting. The idea of refusal to work on non-union goods is intended to distinguish that form of pressure from the more general pressure of striking.

It is probably true that gains are made in legal thinking by the employment of more careful language and finer distinctions, and while the American Law Institute is therefore to be commended for its contribution to the subject, this work will nevertheless employ the traditional language of strikes, picketing and boycotting, and primary and secondary (and, in connection with strikes, the words sympathetic and general) because such language has become too common to the law books and the judicial decision to permit of satisfactory change at this time. Clarification of the meaning of the traditional terms is the most that can be

88. Rest., Torts (1939) Topic 3 (Scope Note); Secs 797, 802-803.

89. Rest., Torts (1939) Sec 802.

90. Rest., Torts (1939) Sec 798.

91. Rest., Torts (1939) Secs 779, 798, 799.

92. Rest., Torts (1939) Secs 807, 808.

attempted at the present time, especially in connection with this work, and its design as a tool for practicing lawyers.

While discipline by a union of its members, the third form of labor activity as classified by the Restatement, is not, speaking generally, a form of activity but rather a means (like a strike vote) of putting one of the forms of activity in motion, the Restatement is justified in including such discipline as a form of labor activity. There are several cases where discipline by a union of its members has been the means of enforcing a strike or a boycott.⁹³ Trade boycotts too have been carried on under cover of trade association by-laws which provide for expulsion from the association for reasons set forth in the by-laws.⁹⁴

It would seem, however, that the Restatement has omitted another form of labor activity which has been assuming increasing importance, i. e., the regulation, by the terms of collective bargaining agreements, of the activities of employers or employees in the industry, even though they are not parties to the agreement.⁹⁵ The matter is amplified in subsequent sections of this work.⁹⁶

93. See *Waterhouse v. Comer*, 55 F 149, 19 LRA 403 (CCWD Ga 1893), *Cohn & Roth Electrical Co v. Bricklayers Union*, 92 Conn 161, 101 A 659 (1917); *Robinson v. Bryant*, 184 SE 298 (Ga 1936); *Bricklayers' Union v. Seymour Ruff & Sons*, 160 Md 483, 154 A 52, 83 ALR 448 (1931), *Yankee Network v. Gibbs*, 3 NE(2d) 298 (Mass 1936); *A. T. Stearns Lumber Co. v. Howlett*, 260 Mass 45, 157 NE 82, 52 ALR 1125 (1927). See also *Edelstein v. Gilmore*, 35 F(2d) 723 (CCA 2, 1929), cert. den 280 US 607, 50 S Ct 153, 74 L Ed 650 (1930) holding that union discipline of its members, though directed against a third party and having as its purpose the withdrawal of the services of the union members from the third party if he does not cooperate with the union in connection with its boycott of the party

involved in the primary dispute, does not constitute a secondary boycott. In *Chicago Federation of Musicians v. American Musicians Union*, 139 Ill App 65 (1908) it was held that a jurisdictional strike could not be carried on by means of a fine levied by the union upon members working with non members

94. *McCarter v. Chamber of Commerce*, 126 Md 131, 94 A 541 (1915). See, for other cases involving the legality of trade boycotts at common law, section 144, *infra*, and under the Sherman Act, section 191, *infra*.

95. See *National Fireproofing Co. v. Mason Builders' Assn.*, 169 F 259, 94 CCA 535, 26 LRA(NS) 148 (CCA 2, 1909); *Briabin v. E. L. Oliver Lodge*, 279 NW 277 (Neb 1938); *Abales v. Friedman*, 171 Misc 1042, 14 NYS(2d) 292 (1939).

96. See sections 173-176, *infra*.

Section 68. Wide Variety of Tactics Employed by Labor in Connection with Labor Disputes.

Generalization of the forms of labor activities, as constituting either strike, picket or boycott, even if implemented by the activities found in union discipline and the disciplinary effect of collective bargaining agreements, does not and from the very nature of the case cannot describe the many forms of pressure exerted by labor unions in connection with given controversies. The sit-down strike, for example, is neither strike without more, nor simply trespass upon the employer's property, but rather an unclassifiable form of pressure reflecting, in general, more radical impulses in connection with labor controversies. In *Boise Street Car Company v. Van Avery*,⁹⁷ the main form of activity carried on for the purpose of making the strike more effective was picketing, but the union also operated a "courtesy car" in competition with the plaintiff's busses. The latter form of pressure was enjoined, in spite of the Idaho State Anti-Injunction Law, because unrelated to the forms of pressure usually exerted in connection with labor disputes, and because constituting an invasion of the plaintiff's franchise.

In some cases, unions have been known to solicit the employer's customers on behalf of competitors.⁹⁸ In others, under the guise of picketing, unions have actually blocked the entrance to the employer's business, as by mass meetings and other street scenes.⁹⁹ In still another, a beauty parlor engaged in a labor dispute was subjected to the activity of a union member marching or dancing in front of the premises of the employer, wearing the disguise of a monkey or an ape, and warning the public that such would be the results of beauty treatments at the employer's place of business.¹

97. 103 P(2d) 1107 (Idaho 1940)

1. *Mlle. Reif v. Randau*, 166 Misc

98. See *infra*, section 114.

247, 1 NYS(2d) 515 (1937).

99. See *infra*, section 124.

Section 69. Legal Theories and the Rightful Aspect.

We pass now to the various legal theories offered by courts and textwriters to explain the reasons for holding lawful the given form of labor activity carried on for a given purpose, in the face of its *prima facie* illegality as an interference with the right to a free and open market. The outstanding theories offered revolve about the notions of (1) malice; (2) motive and intent, primary and secondary, and (3) just cause. Finally, consideration will be given to the contributions of Mr. Justice Holmes to the subject of American labor law, for in his contributions are found the threads which synthesize the various theories into a meaningful whole, and which explain the transition of these theories from instruments of utter worthlessness and fraught with confusion, to tools capable of enabling the judiciary to keep a respectable place among the bodies of men appointed by other men to maintain a social order. The following sections will take up the meaning of these various theories and their limitations, along with the place which Mr. Justice Holmes enjoys in the development of American labor law.

Section 70. Legal Theories and the Rightful Aspect—Malice.

"Malice" in the law of torts, like "waiver" in contract law, is a word with many meanings. Such indeed is the shifting nature of the word malice that, as will be seen hereafter, it may mean nothing, something but very little, or very much.² In defamation cases, the word malice is

2. "Malice as used in the books means sometimes malevolence, sometimes absence of excuse, and sometimes absence of motive for the public good. If so 'slippery' a word, to borrow Lord Bowen's adjective, were eliminated from legal arguments and opinions, only good would result." Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor*, 18 Harv L Rev 411, 422 (1905). In *Flood v. Jackson* [1895]

2 QB 21, Lord Esher, MR, stated "we have been invited to define malice. One cannot do so any more than one can define fraud, and I certainly shall not attempt it. Everyone knows what is meant by a man acting maliciously. The only recognized tribunal that can decide, whether an act is or is not malicious, is a jury." But in *Allen v. Flood* [1898] AC 1, 17 Eng Rul Cas 285, Lord Herschell thus commented

usually employed, but a showing of malice is unnecessary to make out a cause of action; defamatory statements innocently made are actionable. It is sometimes said that defamatory publications raise an inference of malice, but it is generally conceded that this really means that the defamatory publication and not malice is the gravamen of the action. Malice operates only to destroy a qualified privilege. In tort actions generally, malice is a ground for imposing exemplary damages. In cases involving alleged malicious prosecution, malicious abuse of process and malicious actions for the enforcement of civil rights, malice means any motive other than that of a desire to bring the accused to justice. Malice under such circumstances does not mean ill-will; the existence of an ulterior motive is sufficient to show malice, as where a party utilizes the machinery of the criminal law for the purpose of coercing the payment of a debt or the delivery of property.³ Malice is also quite frequently employed in connection with assault, battery and false imprisonment, yet in none of these torts does malice play any part in the ultimate facts necessary to establish a cause of action.⁴ In connection with third party interference with contractual relationships, malice has been said to mean "the intention to appropriate to oneself the promised advantages which another has secured by contract."⁵

In spite of the ambiguous and exaggerated employment of the term, however, malice plays an important role in the law. Indeed, no developed system of law can afford to ignore injurious bad faith conduct carried on under the cloak of activities ordinarily considered legally blameless.

upon the attempt to shift to a jury that which the judiciary is unable to understand "The master of the rolls declined in the present case to define what was meant by 'maliciously', he considered this a question to be determined by a jury. . . . I can imagine no greater danger to the community than that a jury should be at liberty to impose the penalty of paying damages for acts which

are otherwise lawful, because they choose, without any legal definition of the term, to say that they are malicious"

3. *Hall v. American Inv Co* 241 Mich 349, 217 NW 18 (1928).

4. Rest., Torts (1939), Secs 34, 13e, 44.

5. Sayre, *Inducing Breach of Contract* (1923), 36 Harv L Rev 663, 702.

It has been said that "the general rule is that whatever a man may lawfully do under any circumstances, he may do regardless of the motive for his conduct,"⁶ but if any general rule is to be set forth, the opposite would seem to be a more proper statement of the law. Dean Ames has demonstrated the extent to which motive is inseparably connected with legal liability.⁷ The books are filled with cases of malevolent activities carried on under the supposed protective comfort of a legal right, and it is to the credit of the common law that liability generally has followed a showing of such facts.⁸ In *American Bank & Trust Co. v. Federal*

6. *Metzger v. Hochrein*, 107 Wis 267, 83 NW 308 (1900). See also *Ertz v. Produce Exchange*, 79 Minn 140, 81 NW 737 (1900); *Auburn & Cato Plank Road Co. v. Douglass*, 9 NY 444 (1854); *Morris v. Tuthill*, 72 NY 575 (1878); *Kiff v. Youmans*, 86 NY 324, 40 Am Rep 543 (1881); *Lancaster v. Hamburger*, 70 Ohio St 156, 71 NE 289 (1904); *Jenkins v. Fowler*, 24 Pa St 308 (1856); *Glendon Iron Co. v. Uhler*, 75 Pa 467 (1874); *Arnold v. Moffitt*, 30 RI 310, 75 A 502 (1910); *Raycroft v. Tainor*, 68 Vt 1219, 35 A 53 (1896); *Allen v. Flood* [1898] AC 1; *Pollack on Torts* (11th Ed) 23. In some cases language is used to the effect that "the actionability of a person's conduct does not depend upon whether his motive is malicious or beneficent, but upon whether his conduct inflicts legal harm upon the plaintiff." *Burdick on Torts* (3rd Ed) pp. 86-87, where this is said to be the "prevailing rule." See also, *May v. Wood*, 172 Mass 11, 51 NE 191 (1898); *Lancaster v. Hamburger*, 70 Ohio St 156, 71 NE 289 (1904); *Arnold v. Moffitt*, 30 RI 310, 75 A 502 (1910); *South Royalton Bank v. Suffolk Bank*, 27 Vt 505 (1854); *Loeber v. Dickson*, 141 Wis 332, 124 NW 293 (1910). But this begs the very question discussed in the text, i. e.,

when will malice transform an act which may be legally done into one which will impose legal liability upon the defendant because causing "legal harm" to the plaintiff.

7. Ames, *How Far an Act May Be a Tort Because of the Wrongful Motive of the Actor* (1905), 18 Harv L Rev 411. See also *Holmes, Privilege, Malice and Intent* (1894), 8 Harv L Rev 1.

8. See *Gagnon v. French Lick Springs*, 163 Ind 687, 72 NE 849, 68 LRA 175 (1904); *Boggs v. Duncan-Shell Furniture Co*, 163 Iowa 106, 143 NW 482 (1913); *Dunshee v. Standard Oil Co.*, 152 Iowa 618, 132 NW 371 (1911); *Plant v. Woods*, 176 Mass 402, 57 NE 1011 (1900); *Moran v. Dunphy*, 177 Mass 485, 59 NE 125 (1901); *Flaherty v. Moran*, 81 Mich 52, 45 NW 381 (1890); *Hutton v. Waters*, 132 Tenn 527, 179 SW 134 (1915); *Wesley v. Native Lumber Co.*, 97 Miss 814, 53 S 346 (1910); *Tuttle v. Buck*, 107 Minn 145, 119 NW 946 (1909); *Carnes v. St. Paul Union Stockyards Co.*, 164 Minn 457, 205 NW 396 (1925); *Barger v. Barringer*, 151 NC 433, 66 SE 439 (1909); *Al Rashid v. News Syndicate Company*, 265 NY 1, 191 NE 713 (1934); *St. Johnsbury & Lake Champlain R. R. Co. v. Hunt*, 55 Vt 870 (1892); *Keeble v. Hickar-*

Reserve Bank,⁹ where the opinion of the United States Supreme Court was written by Mr. Justice Holmes, it appeared that the defendants, unsuccessful in their attempts to persuade the plaintiff to become a member of the federal reserve system, evolved the scheme, for the purpose of coercing the plaintiff to become a member, of accumulating checks on the country banks until the amount of the checks reached a high figure, and then to cause them to be presented for payment over the counter of the plaintiff. Defendant utilized still other devices whose purposes in their totality were to require payment in cash in such wise as to compel the plaintiff to maintain so much cash in their vaults as to drive them out of business or to force them to submit to membership in the federal reserve system. Plaintiff sought and obtained an injunction, as against the defendants' contention that they did that which they had a right to do. Said the court: "Banks as we know them could not exist if they could not rely upon averages and lend a large part of the money that they receive from their depositors on the assumption that not more than a certain fraction of it will be demanded on any one day. If without a word of falsehood, but acting from what we have called 'disinterested malevolence' a man by persuasion should organize and carry into effect a run upon a bank and ruin it, we cannot doubt that an action would lie. A similar result even if less complete in its effect is to be expected from the course that the defendants are alleged to intend." In *People v. Commerford*,¹⁰ the defendants, union delegates, withdrew a hoisting engineer from a concrete job in which the complainant was engaged, asserting as their reason therefor the fact that non-union truck drivers were employed by the company furnishing, under contract, cin-

ingill (1706) 11 East 574 n (QBD); *Tarleton v. McGawley*, Nisi Prius 1794, Peake NP Cas 270; *Rex v. Kerr*, Nisi Prius, reported in London Times, December 17, 18, 19, 1931—*Garrett v. Taylor*, Kings Bench [1821] Cro Jac 567. But the act complained of must be "solely the

conception and birth of malicious motives unmixed with any other and exclusively directed to injury and damage of another." *Beardsley v. Kilmer*, 236 NY 80, 140 NE 203 (1923). 9. 256 US 350, 41 S Ct 499, 65 L Ed 983 (1921).

10. 233 AD 2, 251 NYS 132 (1931).

ders to the complainant. In fact, however, none but union men were employed by the company furnishing cinders. It appeared that the defendants' act in withdrawing the hoisting engineer from the job was to coerce the complainant into contracting with another cinder company for the furnishing of cinders. When the complainant did enter into a contract with this other cinder company, the defendants permitted the hoisting engineer to return to work. The indictment of the defendants for criminal conspiracy was held good. In *Busch Jewelry Co. Inc. v. United Retail Employees Local*,¹¹ pickets, members of Local 144 of the Window Trimmers Union, were punished after trial by jury, for violation of a labor injunction order. It appeared that the defendant union had theretofore been enjoined from further picketing because of numerous excesses in the exercise thereof. Thereupon, Local 144 of the Window Trimmers Union was prevailed upon to commence picketing as a means of evading the operation of the injunction against the defendant union. The court pierced the illegal scheme, and the pickets were accordingly punished. In *Buckingham Transportation Co. v. International Brotherhood of Teamsters*,¹² picketing was carried on under guise of a purpose to unionize the plaintiff's establishment. The evidence indicated, however, that the picketing was designed to retaliate against the plaintiff because its employees had crossed a picket line set up by the union at another company. Picketing was consequently enjoined.

Having given malice its just due, its utter uselessness as a general tool to deal with the legality of labor activities needs to be demonstrated. Practically all strikes, pickets or boycotts are carried on not for the purpose of maliciously inflicting harm upon the employer, but for the purpose of obtaining some advantage in connection with terms and conditions of employment. It must be emphasized that profit and enterprise are pre-conditions to any successful labor movement. And those who are the leaders of the

11. 169 Misc 156, 7 NYS(2d) 872 Dist Ct 2d Judicial District, August 25, 1939). (1938).

12. 1 CCH Lab Cas 1239 (Colo

modern American labor movement are generally quite conversant with this underlying circumstance. Collective bargaining involves conflicting interests competing for advantage, and not the reflections of "disinterested malevolence."¹³ Harmonious, not maliciously grounded employer-employee relationship, under the terms of a collective bargaining agreement, is the aim and achievement of labor activity. "In a strike, as in trade competition, there may be, in most cases there probably is, ill feeling on both sides, at all events after the strike has gone on for some time, but no strike was ever either commenced or maintained out of spite to master or man, any more than a lockout was ever declared by employer to spite the employed . . . in every organized trade a strike is simply a matter of policy for the trade union."¹⁴ In *Arnold v. Burgess*,¹⁵ a trade association issued an order forbidding its members from availing themselves of the plaintiff's service. The plaintiff sued to restrain enforcement of the order. The Court of Appeals affirmed, without opinion, a judgment entered upon an order of the Appellate Division dismissing the complaint; it appeared that the complaint was dismissed partly upon the ground that there was no actual malice, and that the defendant association acted in good faith and because it believed such order to be to the best interests of the trade. None of the grounds assigned would seem to be particularly persuasive, for neither the absence of malice nor the presence of a bona fide belief that the order was necessary for the protection of the trade should be permitted to stand in the way of censure of socially undesirable restraints upon trade and commerce. The weighing of social and economic interests which underlies the holding of the United States Supreme Court in *Appalachian*

13. See Chapin on Torts (1917) p. 430. "Malice, that much misunderstood term, is said to be the test of liability. When analyzed, this merely means that the object must not be an improper one."

14. Report of the Royal Commission on Trade Disputes and Trade

Combinations, p. 88 (1906). Malice has also played a part in the definition of just cause. See section 73, *infra*.

15. 269 NY 510, 109 NE 511 (1935) affirming 241 AD 364, 272 NYS 534 (1934).

Coals v. United States,¹⁶ where the Sherman Act was considered in relation to the coal industry, appears to be a better, even if sometimes a more difficult, method of dealing with the subject. Thurman Arnold, writing from experience gained through his position since 1938 as Assistant Attorney General of the United States in charge of the Antitrust Division of the United States Department of Justice,¹⁷ has noted sources of confusion which have interfered with effective administration and enforcement of the antitrust laws. "One outstanding source of confusion," he states, "has been the fact that we have considered the intent as more important than the results. This has made it a problem of corporate morality. . . . But the trust problem today is not a problem of private morals. It is not a question of the good or bad intention of the monopolist. Whether some of the largest and most exacting monopolies are directed by men with criminal or benevolent intentions is purely a matter of accident. It is the results growing out of their operation of the price and marketing machinery, which are significant for our purposes."

The idea of malice as concerns labor disputes cases seems to have originated in its most outstanding form, in the case of *Allen v. Flood*,¹⁸ where, in connection with a threat to engage in a jurisdictional strike, the court held the union delegate who had made the threat legally blameless because, even assuming him to have acted maliciously, he did nothing unlawful. Injection of malice into the case was necessitated by failure or refusal of the court to recognize as a legal right, the right to a free and open market. There are American cases holding that a storekeeper has a right of action against an employer who conditions employment upon his employees' refraining from purchasing goods at the storekeeper's place of business,¹⁹ but the decisions

16. 288 US 344, 53 S Ct 471, 77 L Ed 825 (1933).

17. See 7 *Law and Contemporary Problems* 5 (1940).

18. *Houart of Lords* [1898] AC 1.

19. *Graham v. St. Charles St. R. Co.* 47 La Ann 214, 16 S 806

(1895); *Webb v. Drake*, 52 La Ann 280, 26 S 791 (1899); *Weasley v. Native Lumber Co.* 97 Miss 814, 53 S 345 (1910); *International, etc. Ry. Co. v. Greenwood*, 21 SW 559 (Texas Civ App 1893). But see the following cases holding the storekeeper

[1 *Teller*]

speak not of the storekeeper's right to a free and open market unlawfully coerced by the employer, but rather of the employer's "malice" in so doing. We have now come to recognize that right universally.²⁰ It is well to discard the crutch, especially since it was never a good one, now that the patient has gotten well. In *Alfred W. Booth & Bro. v. Burgess*,²¹ the court succinctly pierced the vice of *Allen v. Flood* (supra) in the following words: "If the great English judges who delivered those exceedingly instructive and learned opinions in *Allen v. Flood* [supra] had devoted more time to the ascertainment of the legal right, or the alleged legal right, asserted by the plaintiff, the violation of which constituted the tort charged against the defendant, I incline to think that they would have had less difficulty in ascertaining whether or not any tort had been committed, and, if so, what was the definition of such tort. The effort of a large number of learned judges to define a tort without agreeing upon the primary legal right which the tort postulates, especially when such effort is made with the use of such terms of 'malice' and 'maliciously,' naturally leads to variant and conflicting opinions."

Failure to recognize none but traditional torts likewise led the English judiciary in *Lumley v. Gye*²² to hold that "maliciously" to induce the breach of a contract is a tort. *Lumley v. Gye* was itself an innovator for it was the first holding to the effect that neither fraud nor coercion nor any other traditionally unlawful means were necessary as conditions of liability, but reliance upon "malice" was both unnecessary and productive of confusion. In *South Wales Miners' Federation v. Glamorgan Coal Co.*,²³ which likewise involved alleged tortious interference with contractual

remediless under the circumstances
Guethler v. Altman, 26 Ind App 587,
 60 NE 355 (1901); *Lewis v. Hue-*
Hodge Lumber Co. 121 La 658, 46 S
 685 (1908); *Deon v. Kirby Lumber*
Company, 162 La 671, 111 S 55
 (1927); *Haywood v. Tilson*, 75 Me
 225 (1883); *Dagostino v. Rogers*, 68
 Pa Super Ct 284 (1917); *Payne v.*

Western, etc R R. Co. 13 Lea 507
 (Tenn 1884); *Robison v. Texas Pine*
Land Ass'n 40 SW 843 (Tex Civ
 App 1897).

20. See sections 11-23, supra

21. 72 NJ Eq 181, 65 A 226 (1906).

22. 2 El and Bl 216 [1853].

23. 1 AC 239 [1905].

rights, malice was rejected as the basis of liability, the court saying "It is settled now that malice in the sense of spite or ill-will is not the gist of such an action" but the idea that malice is the ingredient of the tort is still a disturbing factor to be found in the cases.²⁴

**Section 71. Legal Theories and the Rightful Aspect—
"Object" Distinguished from "Good Faith" by the Restatement.**

The confusion and consequent harm which have resulted from the identification of "malice" with labor activity has received the attention of the Restatement of the Law of Torts, with beneficial result. Before taking up the various objects in behalf of whose achievement labor activities may or may not be carried on, the Restatement defines an "object" of concerted action by workers against an employer as "an act required in good faith by them of the employer as the condition of their voluntarily ceasing their concerted action against him."²⁵ While the definition is somewhat technical in nature and at first reading somewhat obscure, further consideration in connection with the comment thereon made by the writers of the Restatement clarifies the intention of the definition. We are thus told that the definition is designed, among other things, "to limit the concept of an object of concerted action to a colorless objective fact without inquiry into its consequences and to eliminate from the process of ascertaining that object any inquiry into the propriety of the conduct."²⁶

Having laid the foundation for an analysis of the relevance of "good faith," the Restatement proceeds: "The object of concerted action must not be confused with the motives which lead workers to desire it. The object of a strike for an increase in wages is the increasing of wages, whether the workers are moved solely by a desire for greater earnings or by ill will toward the employer or by some dogma as to the desirability of militancy at all times. The rea-

²⁴. See Chafec, *Unfair Competition* (1940), 53 Harv L. Rev 1289; Solinger, *Pre-Contractual Interference by a*

Third Party (1932) 6 Cin L Rev 333.

²⁵. Rest., Torts (1939) Sec 777.

²⁶. Rest., Torts (1939) Sec 777 (a).

sonableness of the demand is relevant only on the question whether it is made in good faith. To be the object of their action, the workers' demand must be made in good faith. It is not sufficient that they make the demand, if it appears that their real demand is something else and that the continuance or cessation of their concerted action depends upon the disposal of the latter rather than of the former. In such a case, it is the latter rather than the former that is the object of their action."²⁷

Section 72. Legal Theories and the Rightful Aspect—Motive and Intent; Primary and Secondary Purposes.

Naivete, which is seldom a characteristic of the law, is responsible for the rule, by which the legality of labor activities is purported to be tested, that "The law allows laborers to combine for the purpose of obtaining lawful benefits to themselves, but it gives no sanction to combinations either of employers or employed which have for their immediate purpose the injury of another."²⁸ The idea of primary as distinguished from secondary purposes probably arose from the distinction which the courts drew between acts of competition and acts designed to injure,²⁹

27. Rest, Torts (1939) Sec 777 (f)

28. United Chain Theatres v Philadelphia M P M O U 50 F(2d) 189 (DCFD Pa 1931) Barnes v Chi Typographical Union 232 Ill 424 83 NE 940 945 (1908). See also Bucks Stove & Range Co v A F of L 35 Wash LR 797 (1907), National Fireproofing Co v Mason Builders Assn 169 F 259 (CC V 2 1909) Fenske Bros v Upholsterers Int'l Union, 358 Ill 239 193 NE 112 97 ALR 1318 (1934), cert den 295 US 734 55 S Ct 645, 79 L Ed 1682 (1935); Haverhill Strand Theatre v Gillen, 229 Mass 413, 118 NE 671 (1918); Fink & Sons v Butchers' Union, 84 NJ Eq 638, 95 A 182 (1916); Bossert v Dhuy, 221 NY 342, 117 NE 682 (1917); Blumauer

v Portland M P M O U 141 Or 399, 17 P(2d) 1115 (1933); Erdmann v Mitchell 10 Pa Dist R 701 56 A 327 (1901) Purvis v Local No 500, 214 Pa 348 63 A 585 (1906). Overseas Storage Co v Cholspek 209 AD 834 204 NYS 845 (1924) Falciglia v Gallagher, 164 Misc 838, 299 NYS 890 (1937) George F Stuhmer & Co v Korman 241 AD 702, 269 NYS 788 (1931) aff'd 265 NY 481, 193 NE 281 (1934), Moreland Theatres Corp v Portland M P M O U 140 Or 35, 12 P(2d) 333 (1932), Bomes v Providence Local, M P M O U. 51 RI 499 155 A 581 (1931)

29. See Lord Esher, M. R. in Mogul Steamship Co. v. McGregor [1892] AC 25: "An act of competition, otherwise unobjectionable, done not for the purpose of competition,

but later cases seduced the idea to a means of distinguishing between one method of injury and another. The rule has been differently stated in connection with the words "motive" and "intent," the latter being considered the immediate object sought to be accomplished by the actor, while the former is used as meaning "not to signify the object or the result immediately aimed at, but the cause for entertaining that desire, the feeling that makes the actor desire to attain that result"³⁰ Motive is sometimes also used as a word designed to indicate the presence of malice, but the use of the word motive in that connection is neither helpful nor harmful, and the discussion of the word "malice" in a preceding section has not included any mention of the confusing word "motive" for this reason. It has been said that strikes are held legal while boycotts, though for similar purposes, are held illegal because strikes are said to be called to benefit the strikers while boycotts are called to injure the person boycotted.³¹ Upon the basis of this distinction also, the Massachusetts court held in *Plant v Woods*³² that threats to strike were unlawful and would be enjoined where the purpose in striking was to force other men to become members of the union (because the primary intent was here said to injure) while in *Pickett*

but with intent to injure a rival trader in his trade, is not an act done in an ordinary course of trade, and therefore is actionable if injury ensue." See also *Trollope v The London Building Trades Federation*, 12 TLR 373 (1896).

30. *Smith* *Crucial Issues in Labor Litigation* 20 Harv L Rev 253, 345, 429, at p 451 (1907).

31. "Inasmuch as the strike had been declared legal, even though it resulted in injury to the business or property of another, and interfered with the free course of commerce, the many judges soon found that it would be necessary to modify their declaration of illegality in respect to combinations to injure the property of another. They therefore sought

to distinguish between combinations whose immediate purpose was to injure the business of another, placing boycotts in this category, and those whose immediate object was that of bettering the conditions of labor, although the incidental result of the latter might be injury. Strikes were placed in this class. Boycotts and other combinations whose immediate intent was said to be that of injury were condemned in spite of the fact that their ultimate purpose or motive was to benefit labor, while strikes were pronounced legal." *Laidler, Boycotts and the Labor Struggle*, p. 167.

32. 178 Mass 492, 57 NE 1011, 81 LRA 239, 79 Am St Rep 330 (1900).

v. Walsh³³ it was held that a strike called to secure work for union men was legal (because the primary intent here, said the court, was to benefit the union).³⁴

We need take little time with the distinction between benefit and injury and the legal consequences which some courts imply from such distinction. As stated by Mr. Jeremiah Smith, "In 99 labor cases out of 100, the defendant's motive (or, in other words, his ultimate intent) is to promote his own advantage."³⁵ "In the struggle between labor and capital," wrote a careful observer of the industrial scene in relation to the methodology of the law,³⁶ "each striving for the advantage, as in the struggle between capital and capital, passions are engendered that doubtless lead contestants at times to think more of injuring their opponents than of benefiting themselves, but the legality of their conduct must surely be tested by general considerations, arising from the relations of the parties, and like matters, and not by the quality of the motives in any particular instance."³⁷

Section 73. Legal Theories and the Rightful Aspect—Just Cause.

Superior to any of the legal theories offered to test the

33. 192 Mass 572, 78 NE 753, 6 LRA(NS) 1067, 116 Am St Rep 272, 7 Ann Cas 638 (1906).

34. While, as seen from the text, the distinction between "benefit" and "injury," as a means of determining the legality of labor activity, has generally redounded to the detriment of labor, there are cases where the opposite result has followed. See *National Fireproofing Co. v. Mason Builders Assn.* 169 F 259, 94 CCA 535, 26 LRA(NS) 148 (CCA 2, 1909); *Gill Engraving Co. v. Doerr*, 214 F 111 (DC SD NY 1914).

35. Smith, *Crucial Issues in Labor Litigation*, 20 Harv L Rev 253, 345, 429, at p. 453 (1907).

36. Darling, *Recent American Decisions and English Legislation Af-*

fecting Labor Unions, 42 Am L Rev 200 (1908).

37. See Rest, *Torts* (1939), sec 777: "The same conduct is frequently viewed by different persons as directed toward different aims. Adjectives such as 'direct' or 'indirect,' 'primary' or 'secondary' 'immediate' or 'ultimate,' are commonly used to indicate that aspect of the aims or consequences of concerted action that the speaker wishes to emphasize. And judgment as to the legal propriety of the conduct frequently affects the description of its aims." See also *Carlson v. Carpenter Contractors' Assn.* 305 Ill 331, 137 NE 222 (1922); Harper on *Torts* (1933), p. 439.

legality of labor activity is the theory of just cause. The central defect of the theory of just cause is found in the inability of traditional ways of thinking to work out a satisfactory meaning of just cause, or, to put the matter in another way, to provide an effective content by which the theory of just cause might be used as a real instrument for the judicial supervision of labor disputes.³⁸ The working out of that content is the main contribution of Mr. Justice Holmes to American labor law. The theory of just cause (many of the cases use the term "justification" as the equivalent of just cause) was first most clearly enunciated by Bowen, L. J., in *Mogul S. S. Co. v. McGregor*³⁹ as follows: "Intentionally to do that which is calculated, in the ordinary course of events, to damage, and which does in fact damage, another in that other person's property or trade, is actionable if done without just cause or excuse." The importance of these words lay in the fact that they substituted for the vague boundaries of the doctrine of conspiracy a way of approaching the problem of illegality in relation to labor combinations, with the view of indicating the issues involved in, and consequently the possibility of holding legal, the given labor combination or the given labor activity. But they left unanswered the element or elements which might be considered, for the purpose of finding in law the existence of a just cause or excuse. In the *Mogul* case, the court seemed to think that the "good sense of the tribunal" would suffice to solve the problem. Four different approaches to the problem have been attempted. The first approach defines just cause in terms of the absence of malice. This appears to have been the one adopted in the *Mogul* case⁴⁰ where the court, after stating the theory of just cause, continued with the words "Such intentional action, when done without just cause or excuse, is what the law calls a malicious wrong." The "ab-

38. See *Thornhill v. Alabama*, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940) where the court, commenting upon the words "just cause or legal excuse," said: "The words them-

selves have no ascertainable meaning either inherent or historical."

39. LR 23 QB Div 598 [1889]

40. *Mogul S. S. Co. v. McGregor* [1889] LR 23 QB Div 598.

sence of malice" approach has been adopted in many jurisdictions.⁴¹ The inappropriateness of malice as a means of testing the legality of labor unions and labor activity has heretofore been demonstrated.⁴² The cloak of just cause gives to the notion of malice no new efficacy requiring further discussion.⁴³

The second approach identifies just cause with the existence of a direct and immediate benefit to the doer of the act, as distinguished from a benefit indirect or remote.⁴⁴

41. *American Steel Foundries v. Tri-City Central Trades & Labor Council*, 257 US 184, 42 S Ct 72, 66 L Ed 189, 27 ALR 300 (1921); *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 F 739 (CC ND Ohio 1893); *Carmen v. Fox Film Corp.* 258 F 703 (DC SD NY 1919); *Luke v. DuPree*, 158 Ga 590, 124 SC 13 (1924); *Ran W. Hat Shop v. Sculley*, 98 Conn 1, 118 A 55 (1922); *London Guarantee & Accident Co. v. Horn* 206 Ill 493, 69 NE 526 (1903); *Walker v. Cronin*, 107 Mass 555 (1871); *Plant v. Woods*, 176 Mass 492, 57 NE 1011, 51 LRA 339, 79 Am St Rep 330 (1900); *Joyce v. Great Northern R. Co.* 100 Minn 225, 110 NW 975 (1907); *Carnes v. St. Paul Union Stockyards Co.* 104 Minn 457, 205 NW 630 (1925); *Barr v. Essex Trades Council*, 53 NJ Eq 101, 30 A 881 (1894); *Brennan v. United Hatters*, 73 NJL 719, 65 A 165 (1906); *Campbell v. Gates*, 236 NY 457, 141 NE 914 (1923); *Foster v. Retail Clerks Ass'n*, 39 Misc 48, 78 NYS 860 (1902); *Mangum Electric Co. v. Border*, 101 Okla 64, 222 P 1002 (1924). See 19 Am & Eng Ency. Law, 2nd ed. p 623. See also *Huffcutt, Interference with Contracts and Business in New York*, 18 Harv L Rev 423, 439 (1906), where the malice basis of lack of just cause is set forth in the following language: "The question of justification resolves itself into this—do the desire

and expectancy of accomplishing this particular end warrant the interference with the contracts or business of one who stands in the way of the accomplishment? If that end be only the gratification of feeling, whether of ill will or good will, it is not of such substantial character which justifies inflicting pecuniary loss upon another."

42. See section 70, *supra*.

43. "There are frequent expressions in judicial opinions that 'malice' is requisite for liability in the cases treated in this section. But the context and course of decision make it clear that what is meant is not malice in the sense of ill-will but merely purposeful interference without justification. Malicious conduct may be an obvious type of such interference, but it is only one of several types." *Rest, Torts* (1939), sec 766 (special note).

44. See *Berry v. Donovan* 188 Mass 353, 74 NE 603, 5 LRA(NS) 899, 108 Am St Rep 499, 3 Ann Cas 738 (1905); *Albro J. Newton Co. v. Erickson* 70 Misc 291, 126 NYS 949 (1911) *aff'd* 144 AD 939, 129 NYS 1111 (1911); *Moore v. Bricklayers' Union*, 10 Ohio Dec Reprint 665 (1889); *Olive v. Van Patten*, 7 Tex Civ App 630, 25 SW 423 (1894). See also *American Fed. of Labor v. Buck's Stove & Range Co.* 33 App DC 83 (1909) appeal dismissed 219 US 581, 31 S Ct 472, 55 L Ed 345 (1911);

This is another way of stating the test, heretofore considered, of motive and intent in relation to primary and secondary purposes.⁴⁵ As in the case of malice, the defects inherent in the distinction between a desire to benefit and the will to injure are not one whit obviated by an attempt to work out a just cause from the distinction.

The third approach identifies just cause with the analogy of competition. Labor unions, it is said, have as much right to inflict harm upon capital as does capital to divert the trade from other capital.⁴⁶ Because the analogy to competition is closely associated with the viewpoints of Mr. Justice Holmes, a discussion of that analogy will be deferred to the following sections.

Iron Molders' Union v. Allis (Chalmers Co) 166 F 45, 20 LRA(NS) 315, 91 CCA 631 (CCA 7, 1908). *Hopkins v. Oxley* State Co. 83 F 912, 28 CCA 99, 49 US App 709 (CCA 8, 1897). A germ of this approach is found in cases under the federal Antitrust laws distinguishing between an intent to interfere with interstate commerce and an intent merely to benefit the actors in a lawful way, even though interstate commerce might thereby incidentally be burdened. See *Bedford Cut Stone Co. v. Journeyman Stonecutters Ass'n* 274 US 37, 47 S Ct 522, 71 L Ed 916 (1927) and section 422, *infra*.

45. See section 72, *supra*.

46. See *Doremus v. Hennessy* 176 Ill 608, 52 NE 924, 43 LRA 797, 68 Am St Rep 203 (1898). *London Guarantee & Accident Co. v. Horn*, 206 Ill 493, 69 NE 526 (1903). *Kemp v. Division No. 241*, 153 Ill App 344 (1910); *Lewis v. Huie-Hodge Lumber Co.* 121 La 658, 46 So 685 (1908); *Com. v. Hunt*, 4 Met(Mass) 111, 38 Am Dec 346 (1842); *Beekman v. Margers*, 195 Mass 205, 80 NE 817 (1907); *Mills v. United States Printing Co.* 99 AD 605, 91 NYS 185 (1904); *State v. Van Pelt*, 126 NC 223, 40 SE 177 (1904); *Schonwald v.* 338

Ragnains, 32 Okla 223, 122 P 203 (1912); *Swift & Co. v. Allen*, 151 SW 645 (Tex 1912). *Contra Barnes v. Chicago Typographical Union*, 232 Ill 424, 83 NE 940 (1908). *Barr v. Essex Trades Council*, 53 NJ Eq 101, 30 A 881 (1894); *Alfred W. Booth & Bro v Burgess*, 72 NJ Eq 181, 65 A 226 (1906); *George Jonas Glass Co. v. Glass Bottle Blowers' Assn.*, 77 NJ Eq 219, 79 A 262 (1911). See Taft, C.J., in *American Steel Foundries v. Tri-City Central Trades Council*, 257 US 184, 209, 42 S Ct 72, 78, 66 L Ed 189, 27 ALR 360 (1921). "The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital." See also *Thornhill v. Alabama*, 310 US 88, 60 S Ct 730, 84 L Ed 1093 (1940). In *Hitchman Coal & Coke Co. v. Mitchell*, 245 US 229, 38 S Ct 65, 62 L Ed 260, LRA1918C 497, Ann Cas 1918B 46 (1917) the analogy of competition as the basis of justification in connection with labor union interference with an employment relationship governed by a yellow-dog contract was expressly repudiated.

The fourth approach, reflecting either failure or refusal to think the question through, or unwarranted respect for the meaningfulness of the word "reasonable" in the law holds that whether just cause exists in the given case depends upon whether the conduct complained of may be said to be reasonable under the circumstances.⁴⁷ Hence it is a problem for the jury to determine.⁴⁸ The faith in the jury system possessed by judges who, unable to work out a satisfactory solution in connection with conflicting social and economic claims, refer the matter to a jury to decide the question with whatever instruments may be at hand, is sometimes incredible.⁴⁹

It is the general rule that the burden is on him who asserts the existence of just cause to prove it. As stated in *Cohn & Roth Electric Co. v. Bricklayers Union*:⁵⁰ "The facts found show that the plaintiff has suffered damages in its business and that the defendants contemplated this probable effect. A cause of action was thus made out entitling the plaintiff to judgment, unless the defendants have made out, or the facts presented disclose, that the defendants were justified in what they did."

Section 74. Mr. Justice Holmes and American Labor Law.

Previous sections have canvassed the theories with which

47. See *Carnes v. St. Paul Union Stockyards Co.* 164 Minn 457, 205 NW 630 (1925); *Huskie v. Griffin* 75 NH 345, 74 A 595 (1909). *White Mountain Freezer Co. v. Murphy*, 78 NH 398, 101 A 357 (1917).

48. *Order of Railway Conductors v. Jones*, 78 Colo 80, 239 P 882 (1925); *Berry v. Donovan*, 188 Mass 353, 74 NE 603 (1905); *Carnes v. St. Paul Union Stockyards Co.* 164 Minn 457, 205 NW 630 (1925) rehearing den., 164 Minn 457, 206 NW 396 (1925); *Huskie v. Griffin*, 75 NH 345, 74 A 595 (1909). In *Mogul Steamship Co. v. McGregor* [1899] LR 23 QBD 598, the court indicated that the question was one for the court and

not for the jury: "But such legal justification would not exist when the act was merely done with the intention of causing temporal harm, without reference to one's lawful gain, or the lawful enjoyment of one's own rights. The good sense of the tribunal which had to decide would have to analyze the circumstances, and to discover on which side of the line each case fell."

49. See section 70, note 2 for a case involving the turning over by a judge to a jury of the issue of malice without defining the word malice, and for a case criticizing the first case.

50. 92 Conn 161, 101 A 659 (1917).

the common law has hoped to solve the conflict which capital and labor have brought into the law courts for solution. Malice, motive and intent, and primary, as distinguished from secondary, purposes were paraded and found poor soldiers, which hindered rather than helped the march of the law. Then the notion of just cause was considered, and while it was indicated that here was something new and something basically good, it was seen to be a diamond in the rough because the old categories of thinking, to which were added the idea of competition and the vague term "reasonable conduct," found their way into the meanings ascribed to just cause.

Against this background, Mr. Justice Holmes' writings took form. "The law of torts as now administered," he said by way of explanatory introduction, "has worked itself into substantial agreement with a general theory. . . . that the intentional infliction of temporal damage, or the doing of an act manifestly likely to inflict such damage and inflicting it is actionable if done without just cause."⁵¹ The existence of a "just cause" privileges the doer intentionally to inflict harm. There can be no legal liability in the face of privilege. Of course, it is doubtful if any such "substantial agreement" existed at the time Holmes wrote these words, for many if not most of the courts still decided cases with the tools of criminal and civil conspiracy, and restraint of trade, and without any clear perception as to why a given form of labor activity was being exempted from these vaguely conceived doctrines. Whether Holmes did or did not purposely assume the theory of just cause to be a method of judicial thinking with which the courts had come in "substantial agreement," or whether like Lord Coke, he blandly stated to be the law that which he knew very well was not the law but which he thought in reason ought to be the law, we shall never know. We do know, however, that Holmes always liked to speak the language of the law

⁵¹ Holmes, *Privilege, Malice and Intent*, 8 Harv L Rev 1 (1894). "I venture to think that Justice Holmes's article on 'Privilege, Malice

and Intent' is still the clearest exposition of fundamentals." Hough, D. J. in Gill Engraving Co. v. Doerr, 214 F 111 (DC SD NY, 1914).

books. Unlike legal philosophers who have sought to infuse into the common law a new and strange methodology, he took the judicial process on an outing along accustomed roads of thought in the direction of a newly constructed main highway, and when he reached the main highway, he contended it had always been there.

Reference to fundamentals from another point of view is necessary to indicate Holmes's contribution. Two jurisprudential theories have been advanced, to explain the fundamental conception of legal non-contract wrong in the common law. The first holds that there is a definite number of torts outside which liability in tort does not exist. Historically, such a contention would appear to be irrefutable, for the common law scholar needs not to be reminded of the pigeon-holed writs which preceded and to some extent followed the Statute of Westminster II, and the judicial opinions are legion which have shown a complaining litigant the door, because his complaint was scandalous for reasons of novelty. The second, on the other hand, insists that our law of civil wrongs is based upon the notion that all injuries done to another person are torts, unless justified by law. Sir Frederick Pollack is as prominent in England for the development of the latter theory as is Mr. Justice Holmes in America. We have derived considerable good from the development of the rule of law from case to case. Outstandingly, we owe to the case law background of our law its solid forensic content as distinguished from the ingenious scholastic character of the civil law. But like so many other history-given contributions of the common law, the narrow concepts neatly named and each with respective ultimate facts to be proven failed to evolve a philosophy equal to the task of controlling modern social organization. They failed, for example, to encourage translation into the law as a definite legal right, that which the foundations of economic society recognized as a definite economic right—the right to a free and open market.⁵² Holmes pierced this

52. See *Mogul Steamship Co. v. Flood* [1898] AC 1; *Quinn v. Leat-*
McGregor [1888], 21 QBD 544 (1889) them [1901] AC 495. See also *Ken-*
 23 QBD 598 (1892) AC 25; *Allen v. nedy and Finkelman, The Right to*
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historical veil. That is why the name of Holmes means so much to the development of American law.^{52a}

Holmes went further, and it is the path which we now describe which is his central contribution to American labor law. Having identified the progressive fringe of the law with the notion of privilege, he now proceeded to indicate the manner in which the existence or non-existence of privilege might be determined. The question, he contended, was one of policy, not law; of social advantage, not legal mandate. Neither malice nor the vague test of "reasonable conduct under all the circumstances" nor, indeed, the specious distinction between direct and indirect or primary and secondary purposes as further confused by the words "motive" and "intent" could suffice to make of the judicial process an intelligent tribunal meting out social justice. In *Vegehlahn v. Guntner*,⁵³ Holmes stated in a now famous dissenting opinion, the core of his philosophy of law: "In numberless instances, the law warrants the intentional infliction of temporal damage because it regards it as justified. It is on the question of what shall amount to justification and more especially, on the nature of the considerations which really determine or ought to determine the answer to that question, that judicial reasoning seems to me often to be inadequate. *The true grounds of decision are considerations of policy and of social advantage, and it is vain to suppose that solutions can be attained merely by logic and the general propositions of law which nobody disputes. Propositions as to public policy rarely are unanimously accepted, and still more rarely, if ever, are capable of unanswerable proof. They require a special training to enable anyone even to form an intelligent opinion about them.*"⁵⁴

Trade: An Essay in the Law of Tort (Toronto, 1933).

52a. See also Wigmore, *The Tortious Division of Torts* (1894), 8 Harv L Rev 1. c/f Callmann, *What Is Unfair Competition* (1940), 28 Geo L J 585.

53. 167 Mass 92, 105-106, 44 NE 190

1077, 57 Am St Rep 443, 35 LRA 722 (1896).

54. For an early identification of law with considerations of public convenience which, however, went comparatively unnoticed, see *Farwell v. Boston & Worcester R. Co.* 45 Mass 49, 56 (1842).

Here was the generalization. Holmes clarified his position by condemning the Austinian jurisprudence which held immaterial the motive of the judge's rationale. "Any motive of judicial action," he said, "which can be relied upon as likely in the generality of cases to prevail, is worthy of consideration."⁵⁵ Judges, unlike writers of treatises, speak in relatively short opinions. The full man must be pieced together out of discrete judgments on a variety of subjects. The advantage of a collection of judicial opinions, however, lies in the fact that a more exhaustive and trustworthy indicia is thereby afforded to the real philosophy which has impelled their writing—a philosophy which has its source in actual conflicts among men. A host of judicial decisions bears witness to the specific projection of the general concept into the warp and woof of the common law. "Indeterminate" was the word with which he disparaged the claimed certainty which logicians saw in the major premise asserted as a guide to the judicial decision. Indeed, he shared his illustrious father's aversion to logic unmitigated, an aversion which occasioned one of the most devastating darts at the narrow New England logical insistence.⁵⁶ The great jurist preferred human experience as the vital motivation of judicial action.

What then, was to be the underlying "motive of judicial action?" A balancing of competing claims—the scales of justice weighed heavily upon the side of their cost to society, but just as heavily upon the side of their social worth: "It has been the law for centuries that a man may set up a business in a country town too small to support more than one, although he expects and intends thereby to ruin someone already there, and succeeds in his intent. In such a case, he is not held to act 'unlawfully and without justifiable cause' . . . the reason, of course, is that the doctrine

55. Early Writings of O. W. Holmes, Jr., 44 Harv Law Rev 771, 789 (1931).

56. Dr. Oliver Wendell Holmes's "The Deacon's Masterpiece, or The Wonderful 'One-Hoss Shay,' A Logical Story" of a shay built to last

forever, but which inexplicably fell apart after it had lasted "a hundred years to a day." The author concludes, it will be recalled, as follows: "End of the wonderful one-hoss shay; Logic is Logic. That's all I say."

generally has been accepted that free competition is worth more to society than it costs, and that on this ground the infliction of the damage is privileged."⁵⁷

The intellectual modesty of the great jurist was the springboard of his broad perspective in relation to the surge of new social claims: "A constitution," he once said, "is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez-faire. It is made for people of fundamentally different views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question, whether statutes embodying them conflict with the Constitution of the United States."⁵⁸

Holmes had no illusion about the role of intelligence in the industrial warfare. He knew well the human and financial cost of the strike, picket, boycott and labor activities in general. But he refused to be fooled by the classical platitudes about the free play of individualism. "One of the eternal conflicts out of which life is made up," he said,⁵⁹ "Is that between the effort of every man to get the most he can for his services, and that of society, disguised under the

57. *Ibid.* p 107 Professor John Henry Wigmore, in his article, *Justice Holmes and the Law of Torts* in 29 *Harv L Rev* 614 (1916) has stated of Holmes that "Under Necessities of Industrial Livelihood, we come to some of his most distinctive opinions. They deserve an essay or a treatise by themselves; for they invoke and expound a whole philosophy of the economic struggle with careful shaping of particular distinctions for the several typical situations. No man can consider himself to have a respectable conviction on this subject unless he has faced with the dissenting opinion in *Vegeahn v. Guntner*."

58. *Dissenting in Lochner v. New York*, 198 *US* 45, 25 *S Ct* 539, 49 *L Ed* 937 (1905) where the New York bakery law was held unconstitutional.

tional

59. *Dissenting in Vegeahn v. Guntner*, 167 *Mass* 92, 108, 44 *NE* 1077, 51 *LRA* 339, 79 *Am St Rep* 330 (1896) "I can remember when many people thought that apart from violence or breach of contract, strikes were wicked as organized refusal to work. I suppose that intelligent economists and legislators have given up that notion today." *Ibid.* at p 109, *Vegeahn v. Guntner* has achieved prominence not because of its holding but because of the wisdom of Holmes' dissenting opinion. The majority of the court in that case held picketing inherently illegal. The case has been repudiated by a later Massachusetts case, *Simon v. Schwachman*, 18 *NE(2d)* 1 (*Mass* 1938).

name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way." Having openly identified combinations with associations of men designed to achieve power, he was prepared to disparage any inquiry into "primary" as distinguished from "secondary" purposes of combinations, and to insist instead upon testing them in the light of their social consequences—justification to Holmes was not a subjective differentiation between good men and bad men but rather an objective sorting of socially good purposes from purposes socially detrimental.

Section 75. Labor Activity and the Analogy of Competition.

Holmes's theory has sometimes been described with the words "competitive justification." Labor's rights according to Holmes, that is to say, have at times been said to find their source in an analogy to trade rivalry.⁶⁰ Holmes lent credence to such an interpretation. In the first place, he was essentially an individualist. Though combining a flexible mind with an inflexible perseverance in behalf of the legally dispossessed, he believed firmly that free initiative spurred on by the profit motive was the best method through which human beings might achieve a social

60. See Nelles and Mermin, *Holmes and Labor Law* (1936) 13 NYULQ 517, 532. For other writings basing the legality of labor activity upon the ground of competitive justification, see Note, 17 Harv LR 140 (1904); Wyman, *Competition and the Law*, 15 Harv LR 427, 443 (1902). Smith, *Crucial Issues in Labor Litigation*, 20 Harv L Rev 253, 429 (1907); East, *Torts* (1939) Topic 2, Introductory Note. Professor Williston has most simply stated the notion of competition as the basis of

employer-employee rivalry as follows: "The largest element of cost in most economic production is that of labor. Other things being equal it is for the interest of employers to pay as little as possible, and for the interest of employees to obtain as large pay as possible." Williston, *Contracts* (Rev Ed) p. 4653. For cases applying the analogy of competition, and cases expressly refusing to apply the analogy, see section 76, *infra*, at note 46.

order.⁶¹ In the second place, he indicated in *Plant v. Woods*⁶² that what labor unions get, they get at the expense of the unorganized portion of the community: "I think it is well to add that I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy to suppose that there is a body of capital of which labor as a whole secures a larger share by that means. The annual product, subject to an infinitesimal deduction for the luxuries of the few, is directed to consumption by the multitude, and is consumed by the multitude always. Organization and strikes may get a larger share for the members of the organization but, if they do, they get it at the expense of the less organized and the less powerful portion of the laboring masses. They do not create something out of nothing." Indeed, Holmes drew an analogy between trade competition and competition between labor and capital.⁶³

The wider view which Holmes sought to express in relation to labor activities, however, transcended competition as the sole analogy which lay at the base of labor's justification to inflict temporal harm. Competition was merely an analogy which he used to illustrate the larger point that social benefit will sometimes justify individual discomfort.⁶⁴ Thus in *Truax v. Corrigan*,⁶⁵ Holmes, dissenting, disagreed with the court's holding that the Arizona legislature had no constitutional power to pass an anti-labor injunction statute because the statute deprived the owner of a business of his property without due process of law. Circumstances of time and place in a society whose semblance of wholeness hid so many patterns of conflicts

61. See Morris R. Cohen, *Law and the Social Order* (1932), p. 201.

62. 167 Mass 492, 57 NE 1011, 35 LRA 722, 57 Am St Rep 443 (1896).

63. "I have seen the suggestion made that the conflict between employers and employed is not competition. Certainly the policy is not limited to struggles between persons of the same class competing for the same end. It applies to all conflicts of temporal interests." Holmes, J., dissenting in *Vegelahn v. Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722, 57 Am St Rep 443 (1890).

64. See Holmes, *Privilege, Malice and Intent*, 8 Harv L Rev 1 (1894).

65. 257 US 312, 42 S Ct 124, 86 L Ed 254, 27 ALR 375 (1921).

[1 Teller]

justified the statute, said Holmes. "An established business, no doubt, may have pecuniary value and commonly is protected by law from various unjustified injuries. But you cannot give it definiteness of contour by calling it a thing. It is a course of conduct and like other conduct is subject to substantial modification according to time and circumstances both in itself and in regard to what shall justify doing it a harm."

It is inaccurate to suppose that the notion of competition which justifies the infliction of many forms of otherwise legal harm in cases involving business rivalry will likewise explain all or even nearly all of the labor cases. Labor and capital are competitors, to be sure, with respect to the share of each in the product of industry. But there the analogy ends. Not competition but social welfare is the fountain head of labor's claims to justification (and also the source of its liabilities). Whenever labor is not pointing to its inequality of bargaining power as the source of its justification to engage in combined action, it will be observed that some social advantage or other is alleged to be served by labor activity of a given kind. Thus, striking or picketing to coerce an employer to abandon machines and to reengage human workingmen,⁶⁶ presents a problem which the category of labor's unequal bargaining power is inadequate to solve but which, on the other hand, the idea of competition will likewise fail to resolve.⁶⁷ Labor will be found contending at times that competition among businessmen must be carried on subject to the right of each workman to a living wage. Competition, in other words, is distinctly ruled out as a source of analogy. It serves but to confuse, and not to help, to insist that the legal basis of labor activity is to be found solely in the notion of competition.

Looking now at the problem from the viewpoint of actual court holdings in cases where employers seek to enjoin or to punish labor activity of one kind or another, it will be

66. See *infra*, section 89, for a discussion of the legality of such striking.

67. *q/v* Rest., Torts (1939) Sec. 784c.

seen that competition is an inadequate tool upon which to base a finding of justification or the lack of it. The idea of free trade has admittedly played an important role in relation to the legality of the closed shop.⁶⁸ But why, if competition is the justifying feature, should a secondary strike or secondary picketing or boycotting be held illegal in jurisdictions where like primary labor activity is held legal? The analogy of competition will not serve to explain the cleavage. Why are courts solicitous to examine the purpose of a given strike, picket or boycott, so as thereby to determine whether a social good would be served by permitting or prohibiting the given activity? Labor law cases present social problems peculiar to the employment relationship, which no one analogy to other relationships will suffice to solve. The law as presently laid down in judicial decisions is not comprehensible solely from the point of view of the notion of competition.⁶⁹

Finally, and for the purpose of synthesizing the law that is with the law that ought to be, it should be stated that competition may, but many times does not, prove an adequate tool with which to test the rights and wrongs of labor activity. Sometimes, to be sure, competition is a helpful analogy, as in the case of efforts made by a labor union to secure new members bound by yellow-dog contracts of employment. The right of a competitor to persuade at-will employees to leave their employment and to take up

68. See *infra*, sections 98, 170.

69. Could a labor union set up a competing business solely for the purpose of defeating the employer in connection with the labor controversy, and not for any purpose of competition as part of the battle of trade? It is not fair to state that a negative answer to this question would place the person so answering into the camp of those who disagree with the analogy of competition, since it might be argued that the analogy of competition only applies to the legitimate forms of la-

bor activities, such as a strike, picketing, boycotting, union discipline, or the discipline resulting from collective bargaining agreements. In *Boise Street Car Company v. Van Avery*, 103 P(2d) 1107 (Idaho 1940), the union picketed in connection with a strike, and also set up "courtesy cars" in competition with the employer's busses. The court held that this form of activity was not related to the dispute and was an invasion of the plaintiff's franchise, and was illegal notwithstanding the anti-injunction law.

work with the competitor, if such persuasion is carried on in good faith and as an incident of competition, is a helpful analogue for like rightful activity undertaken by a labor union. Again, the analogy of competition is helpful to labor for the purpose of justifying labor activity in connection with a business in the hands of a receiver, since even a business in the hands of a receiver is not immune from the perils of the market place in a competitive society.⁷⁰ But at other times, competition is unequal to the task of solving the legality of labor activity because unduly narrowing the permissible area of activity. Competition has never been relied on as the legal basis of, say, the secondary boycott, nor could any competitor be heard to say that coercion of third parties may be carried on as a legitimate weapon in the battle of trade. In point too is the contention advanced by labor that union organizers have the right to induce the breach by employees of contracts though they be term contracts of employment, because the organizers are experts advising employees in connection with their welfare and not simply intermeddlers or competitors.⁷¹ At still other times, upon the other hand, the illustration of competition may widen unduly the allowable ambit of labor activity, as where labor unions strike or picket to prevent the introduction of labor saving machinery,⁷² or where picketing is carried on to persuade an employer to abandon one business and to open another instead,⁷³ or where a strike or boycott is carried on against employers who refuse to join an employers' association with whom the labor union has entered into a collective bargaining agreement,⁷⁴ though the boycotted employer is otherwise willing and ready to accede to the union's demands. No opinion is here expressed in connection with the legality or illegality of these several forms of activity: the point is made, rather, that they present problems which call for new solvents and not old proportions.

70. See *supra*, section 52.

71. See *supra*, section 48.

72. See *infra*, section 89.

73. See *infra*, section 114.

74. See *infra*, sections 102, 174, 175.

Section 76. Recognition by the Judiciary of Its Law Making Task in Connection with Labor Problems.

The story of labor's quarrel with the common law, which constitutes a large portion of the subject of labor law, is a record of changing rules, principles and viewpoints announced at different times by different courts. This is not meant to criticize but rather to commend the judiciary for its ability to modify and even to overrule older doctrines in the face of countervailing social, economic and political circumstances. The evolution of the picket, which was first viewed as a means for identifying non-cooperating workers,⁷⁵ and later considered an instrument of economic warfare,⁷⁶ to its present stage as such a method of persuasion as may be entitled to the constitutional protection afforded to persons engaged in the exercise of free speech,⁷⁷ is an instance in point. So also is the gradual legalization of the closed shop as a permissible subject of collective bargaining,⁷⁸ and a legitimate subject of labor activity.⁷⁹ These are random illustrations. They are part of a larger pattern in a general scheme which calls upon the judiciary frankly to assume the role of law making, and to discard the pretense of "finding" the law. Numerous reasons have been advanced for the persistence of the law-finding theory. Under one, the consequence of historical jurisprudence, it is said that in habit and custom, the "Volkegeist" of the people may be ascertained.⁸⁰ Another is said to be found

75. See *Iron Molders' Union v. Altis Chalmers*, 166 F 45 (CCA 7, 1908).

76. See *Truax v. Corrigan*, 257 US 312, 42 S Ct 124, 66 L Ed 254, 27 ALR 375 (1921); *American Steel Foundries v. Tri-City Central Trades Council*, 257 US 184, 42 S Ct 72, 66 L Ed 189 (1921); *Jensen v. St. Paul Moving Pictures*, 149 Minn 58, 259 NW 811 (1935); *Tunick v. Int'l Ass'n*, 2 CCA Lab Cas 302 (California Superior Ct. 1939).

77. See *Senn v. Tile Layers Protective Union*, 301 US 468, 57 S Ct 57, 81 L Ed 1229 (1937). See also 1938

Thornhill v. Alabama, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940); *Carlson v. California*, 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940).

78. See section 170.

79. See sections 97-100, 114, 149, *infra*.

80. Frederick von Savigny, *Of the Vocation of our Age for Legislation and Jurisprudence* (London, 1831). See also Kantorowicz, *Savigny and the Historical School of Law* (1937), 52 Law Q Rev 334; Pound, *Interpretations of Legal History* (1930), pp. 12-20.

in the circumstance that our law has developed from categories of legal wrong (to which reference has been made in a preceding section^{80a}) as a result of which judges were wont to look in old categories to resolve newly arising asserted wrongs,⁸¹ while another emphasizes stare decisis as the dispositive cause. Still another, a contention of realist jurisprudence, holds that a desire to preserve the illusion of certainty induced judges to insist that every decision was merely the logical consequence of all prior decisions and not the reflection of any new way of thinking.⁸² Today, few legal thinkers cling to the contention that judges find and not make new law with each new decision.^{83a} Much, it is now said, is "found" because much has been laid down in the books as an aid to present and future generations, but new interests have called forth decisions which have found their source in newer thoughts and not older books. This, it is said, ought to be frankly avowed instead of sometimes furtively admitted, so that we may develop more intelligently the means of ascertaining correct solutions in the future. In labor law as in perhaps no other branch of the law, the process of judicial law making has been proceeding with rapid pace for the reasons, first, that the questions presented for judicial determination are so novel, and second that they involve so patently considerations of public policy that it is difficult to hide their underlying drives. In *Bomes v. Providence Local No. 223*,⁸³ where the court held picketing illegal unless carried on at a distance from the place picketed, the court stated: "This is the first time that the question of picketing has arisen in this court. The decisions on that question in the State and Federal courts and the reasons therefor are many and conflicting. We think that much of the uncertainty and confusion in the reported decisions results from the attempt to establish a general rule of law which

80a. See *supra*, section 74.

81. See Kennedy and Finkelman, *The Right to Trade: An Essay in the Law of Tort* (Toronto 1933), p. 2.

82. See Jerome Frank, *Law and*

the Modern Mind (New York 1935).

83a. But see Snyder, *Retrospective Operation of Overruling Decisions* (1940), 35 *Ill L Rev* 121.

83. 51 *RI* 500, 155 *A* 581 (1931).

shall govern in every labor controversy; but no such general rule has yet been established and each case must be decided upon consideration of the facts and of the rights of the opposing parties." In *Keith Theatre v. Vachon*,⁸⁴ the Supreme Judicial Court of Maine, when first called upon to pass on the legality of picketing for the closed shop and in the absence of a strike frankly stated that "this court, then, both unaided and unhampered by prior Maine decisions, but well served by the reasoning of other courts, is free to declare as law herein that which it considers best calculated in accordance with legal principles to effect justice."

The illusion of continuity, it must be admitted, is still a potent factor as an obstacle to frank espousal by judges of their role as law-makers.⁸⁵ Take, as an illustration, the evolution of the New York rule governing the legality of the closed shop. Here is an interesting case of judicial insistence upon *stare decisis* in the face of a disregard of its precepts. At first, in *Curran v. Galen*,⁸⁶ the closed shop contract was held illegal though involving only one of many employers. Eight years later such a contract was held legal in *Jacobs v. Cohen*⁸⁷ upon the ground that it did not result in a monopoly throughout the entire industry. A distinction accordingly developed between closed shop contracts involving a union and a single employer, which were legal,⁸⁸ and like contracts with substantially all employers in a given industry, which were illegal.⁸⁹ In *Williams v. Quill*,⁹⁰ the Court of Appeals repudiated this distinction, holding the closed shop valid generally. *Curran v. Galen*, (*supra*) was "distinguished" as

84. 134 Me 392, 187 A 692 (1936).

85. See *Gelpcke v. Dubuque*, 1 Wall 175, 17 L Ed 520 (1863), in connection with which see *Tidal Oil Co. v. Flanagan*, 263 US 444, 44 S Ct 197, 68 L Ed 382 (1924); *Great Northern Railway Co. v. Sunburat Oil & Refining Co.* 287 US 358, 53 S Ct 148, 77 L Ed 360 (1932); *Erie R. Co. v. Tompkins*, 304 US 64, 58 S Ct 64, 82 L Ed 1186 (1938). But see *Snyder*, *Retrospective Operation of*

Overruling Decisions (1940) 35 Ill L Rev 121.

86. 152 NY 33, 46 NE 297 (1897).

87. 183 NY 207, 76 NE 5 (1905).

88. *Ribner v. Rascio Butter Co.* 136 Misc 616, 238 NYS 232 (1929).

89. *McCord v. Thompson-Starrett Co.* 129 AD 130, 113 NYS 385 (1908), *aff'd* 198 NY 587, 92 NE 1090 (1910).

90. 277 NY 1, 12 NE(2d) 547 (1938), appeal dismissed 303 US 621, 58 S.Ct 650, 82 L Ed 1085 (1938).

having been so decided because of the defendant's malice and ill-will. Nowhere in the Quill case (except in its holding) does it appear that new law went into its decision.⁹¹

We shall some day have cause to state that the words of the court in *Tuttle v. Buck*,⁹² where malicious interference with business was held to be the basis for a cause of action as against the wrongdoer's contention that the right of competition precluded the court from probing into his motives, represent a settled American judicial point of view: "It must be remembered that the common law is the result of growth, and that its development has been determined by the social needs of the community which it governs. It is the resultant of conflicting social forces, and those forces which are for the time dominant leave their impress upon the law. It is of judicial origin, and seeks to establish doctrines and rules for the determination, protection, and enforcement of legal rights. Manifestly it must change as society changes and new rights are recognized. To be an efficient instrument, and not a mere abstraction, it must gradually adapt itself to social conditions. Necessarily, its form and substance have been greatly affected by prevalent economic theories."

Section 77. Larger Views and the Road toward Tomorrow.

A thoroughgoing interpretative analysis of American labor disputes and collective bargaining law has yet to be written. Critical descriptions, to be sure, such as those contained in Frankfurter and Greene's "The Labor Injunction," and Edwin E. Witte's "The Government in Labor Disputes"⁹³ have dealt with particular legal doctrines in terms of some of their social consequences. Again, much

91. It is to be noted, however, that the court pointed to the fact that a 1933 amendment to the General Business Law (Section 340) excepted labor organizations from anti-monopoly legislation. See, for a further discussion of Section 340 of the General Business Law, *infra*, section 456.

92. 107 Minn 145, 119 NW 346

(1909).

93. See also Todd, *Industry and Society: A Sociological Appraisal of Modern Industrialism* (1933); Sharp and Gregory, *Social Change and Labor Law* (1939); Cohen, *An American Labor Policy* (1919); Lelserson, *Right and Wrong in Labor Relations* (1938).

of the driftwood of curious and unfounded legal doctrine governing American labor law has been cast away by the incisive contributions, as has been seen, of Mr. Justice Holmes. But water which is pure is not always most beneficial if the direction of its flow is not also appropriate.

The broad scope of such a thoroughgoing interpretative analysis is not within the purview of this work, which is dedicated primarily to a study (with occasional sallies of evaluation and criticism to be sure) of the positive labor law now laid down in legislative enactments and judicial decisions. Nevertheless, it is patently impossible to write upon the subject of strife in connection with industrial relations without according some consideration to the political and sociological background against which American labor law has developed,⁸⁸ and without also considering the possibility of strengthening the link which connects the American labor movement with American democratic society. The impediments to such connections, and the factors which ought to go into any sociological basis of labor law, are the subjects of this section.

1. Sources of Confusion

Tabulation and case-matching will afford no clue to the overtones of American judicial labor law, for neither faithfulness nor diligence can resolve the ambiguity nor clarify the vagueness of the present state of our judicial labor law. There is nothing, for example, in the case of *Exchange Bakery v. Rifkin*,⁸⁹ which announced for the first time in New York the legality of picketing in the absence of a strike, to explain why the New York Court of Appeals thought it wise to reject an imposing host of countervailing and theretofore apparently settled lower court decisions.⁹⁰ Nor can any amount of purely legal theorizing interpret the sway of New Jersey decisions which one day

⁸⁸ See also *supra*, sections 1-4, for a discussion of the historical background of modern labor relations law.

⁸⁹ 245 NY 260, 157 NE 120

(1927), rehearing denied 245 NY 661, 157 NE 896 (1927).

⁹⁰ See note, 40 Harv L Rev 896n (1927) for a list of the lower court decisions alluded to.

held the strike for the closed shop totally invalid,⁹⁷ only to hold on another day that it might be partially valid⁹⁸ and on still a later day that it was void after all.⁹⁹ And it will hereafter be seen in general how the courts of the several states have split in disposing of the given form of labor activity for a given purpose. Confusion apparently without ancestry or destination exists in relation to such activities, among others, as the strike, picket or boycott for the closed shop, picketing in the absence of a strike, the secondary strike, picket and boycott, or picketing in non-labor disputes. Finally, the disorder of legal doctrine governing collective bargaining agreements would seem to indicate the present helplessness of traditional common law reasoning to cope with the by-products of modern industrial society. Coke's dictum, which would identify the common law solely with reason, is difficult of application to the present state of our judicial labor law. Voltaire's old Brahmin could afford to ask for nothing more because he was both wealthy and wise, but our judicial development governing industrial strife must still be circumspect, because its content can boast of neither. The monstrous pretense of certainty often assumed by the judiciary ill conceals the eccentric and hence unintelligible content of modern judge-made labor law. It is no coincidence that *Anti-Injunction Acts* have been passed both by state and federal legislatures almost concomitantly with *Labor Relations Acts*. Both restrict the role of the judiciary in the adjustment of labor controversies. Both stem from a general suspicion of the inadequacy of the common law judicial mind to cope with the modern labor problem in its manifold aspects. Recourse to the legislature bears largely the reflection of the failure by the judiciary to make equality and direction the guiding precepts of the decided case.

97. *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Company*, 92 NJ Eq 131, 111 A 376 (1920).

122 NJ Eq 298, 104 A 54 (1937).

98. *Canter v. Retail Furniture Employees*, 112 NJ Eq 575, 106 A 210 (1937). The question is still an unsettled one. See *infra*, section 431.

99. *Four Plating Co. v. Mako et al.*,

Fraught with confusion is an additional circumstance inadequately noted in the accounts of our law. Our investigation concerns itself generally with the law as laid down by Federal and State legislative bodies and in reported cases decided generally by appellate courts. It is unfortunate that we take our ideas as to that which is, by what the statutes and appellate courts say it ought to be. A wider and more accurate view of labor law in actual operation needs to include a study of the workings of municipal ordinances, and of Magistrates' Courts, Justices of the Peace and other inferior judicial tribunals whose decisions are often unreported. The prevalence of municipal ordinances denying the right to free speech is indicated by the number of recent United States Supreme Court decisions declaring such ordinances unconstitutional and hence void because colliding with the constitutional guarantee.¹ Disparities between high court and lower court holdings are numerous. It was generally, for example, and to some extent still is the practice of New York Magistrates' Courts to convict pickets of disorderly conduct where they failed to heed a policeman's move-on order, without careful inquiry into the necessity for the order.² Again, nothing could have been more settled in the State of New York in the year 1939 than that picketing for the closed shop, or picketing in the absence of a strike, were legal labor activities. The Court of Appeals, highest court in the state, had theretofore so held in words unmistakable.³ Yet in *Bond Stores, Inc. v.*

1. See *Lovell v. Griffin*, 303 US 444, 68 S Ct 666, 82 L Ed 949 (1938); *Schneider v. Irvington*, 308 US 147, 60 S Ct 146, 84 L Ed 155 (1939); *Cantwell v. Connecticut*, 310 US 296, 60 S Ct 900, 84 L Ed 1213 (1940); *Thornhill v. Alabama*, 310 US 88, 60 S Ct 738, 84 L Ed 1093 (1940); *Carlson v. California*, 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940).

2. See Note, 5 *Brooklyn Law Rev* 216-217 (1935). In *People v. Galpin*, 259 NY 279, 181 NE 572, 83 ALR 785 (1932) the court said "a refusal to obey such order can be justified only where the circumstances

show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order." See also *People v. Ward*, 159 Misc 328, 287 NYS 432 (1936), *aff'd* 272 NY 615, 5 NE(2d) 359 (1936).

3. *National Protective Association v. Cumming*, 170 NY 315, 73 NE 267, 58 LRA 135, 86 Am St Rep 646 (1902); *Williams v. Quill*, 277 NY 1, 12 NE(2d) 547 (1938) *app. dis.* 303 US 321, 58 S Ct 650, 82 L Ed 1086 (1938); *Exchange Bakery v. Rifkin*,

Turner,⁴ a court inferior to that of the Court of Appeals, with apparent disregard for the high court holding, decided both propositions to the contrary. That the stand taken in picketing cases by the highest court in any state does not always indicate what unions may or may not do as a practical matter, is further illustrated by the situation in New York. While the Court of Appeals has sanctioned picketing in disputes between rival labor unions even where picketing tends to induce breach of contract,⁵ the lower courts have manifested far less solicitude for labor's needs.⁶ And in spite of the limitations placed upon the trial court's discretion by the requirements that injunctions be no broader than the actual facts, sweeping injunctions continue to be issued.⁷ The relative paucity of appellate decisions upon the various problems which arise in relation to the activities of labor, in the face of the enormous increase in industrial unrest, indicates the point. Spectacular strikes reach the newspapers, to be sure, but they rarely get to the appellate courts. Less spectacular strikes fail to reach even the press. They succeed or fail to the extent that strategic strength or inferior court holdings dispose of the dispute. It is not denied that appellate court decisions do affect the growth of the labor movement alike with its direction and the possibilities for its development. Popular respect—even awe—for the judiciary is an ever-present factor in the shaping of public opinion in America.

245 NY 260, 151 NE 130 (1927), reargument denied 264 NY 620, 191 NE 595 (1927).

4. 14 NYS(2d) 705 (1939) Supreme Court, Appellate Division, Third Department. See also *Kraushaar v. Krug* (Sup Ct Nassau County) 102 NYLJ 1904 (1939).

5. *Stillwell Theatre v. Kaplan*, 250 NY 405, 182 NE 63, 84 ALR 6 (1932), rehearing denied 260 NY 563, 184 NE 93, 84 ALR 12 (1932), cert. den. 288 US 606, 53 S Ct 397, 77 L Ed 981 (1933).

6. See, for example, *Spinner v. Doe*, 13 NYS(2d) 433 (1939), where pick-

eting was enjoined in a case on all fours with the *Stillwell Case*. Nevertheless the *Stillwell Case* was not cited. See, for the legality of picketing in jurisdictional disputes cases, *infra*, sections 130-133.

7. See Note (1933), 32 Col L Rev 1188. See also Note (1940), *The New York Anti-Injunction Act*, 49 Yale L Jour 537, for the view that one of the main purposes of the Act was to make lower courts fall in line with the liberal attitude adopted toward labor and labor activity by the New York Court of Appeals.

But the extent to which an appellate court's pronouncement of a labor right really assures reasonable respect by lower courts for the right thus vindicated, is a profound sociological problem which has not as yet been subjected to adequate scholarship. Present evidence shows a marked disparity between the holdings of appellate courts and the decisions of lower tribunals.

Yet another source of confusion and uncertainty is found in the influence exerted upon the direction of labor activity by the executive branch of local, state, and federal government. It has been pointed out that "what labor unions could actually do to realize their purposes also depended, even to a larger extent, upon the way in which mayors of cities, sheriffs of counties, governors of states, and the President of the United States made use of the police and military arms entrusted to them. In short, the right to strike, picket, persuade, hold meetings, parade, and coerce at any specified time and place depended more upon the authorities in control of physical force than upon any fine theories embodied in the law books."⁸ But recently, for example, a New York City Mayor issued an order to the city police department directing all pickets of churches to be arrested, though the picketing were peaceful⁹ and this in spite of a prior United States Supreme Court holding which, rightly or wrongly, identified the right to picket with the constitutional exercise of the right to free speech.¹⁰

8. Beard, *The Rise of American Civilization*, Vol. II, p. 240.

9. "Declaring that he would not tolerate the picketing of God, Mayor LaGuardia directed Police Commissioner Valentine yesterday to bar picketing of places of worship and church rectories of every faith." *New York Times*, Oct. 19, 1939.

10. *Senn v. Tile Layers Association*, 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937). For a criticism and general discussion of the case, see *infra*, sections 135-140. The same Mayor declared in disregard of contrary holdings by the highest

state court (see *Stillwell Theatre v. Kaplan*, 259 NY 405, 182 NE 63, 84 ALR 6 (1932), rehearing denied 260 NY 563, 184 NE 93, 84 ALR 12 (1932), cert. den. 298 US 606, 53 S. Ct. 307, 77 L. Ed. 961 (1933)), that picketing in jurisdictional disputes would not be tolerated. *N. Y. Times*, Dec. 8, 1939. Let it be noted that no criticism is necessarily made of the subject of the Mayor's utterances; one need not question the wisdom of the subject matter of the Mayor's edicts to criticize their issuance. It is difficult to discover the source of such a power in a city executive to de-

In *Ferguson v. Peake*,¹¹ there was disclosed a District of Columbia police regulation which prohibited picketing of retail establishments, and this in spite of the legislative policy declared in the Clayton and Norris Acts.

2. *The Great Hiatus*

Law is often associated with order. It would seem, however, that we must rest content with a definition of American labor law in terms of a jurisprudence of chaos. This would have the support of tantalizing suggestion in the judgment that courts of law are simply as inconstant as the general conditions of present day civilization, and in the reinforcement of a substantiating circumstance,—for the cases are all too barren of any extended reasoning, but seem rather to hurry on to new law-making conclusion with such brevity and precipitation as to induce the belief that their rationales are grounded in hasty compromise instead of survey, reasoning and ordered conclusion. We might, with Professor Ritchie, find solace in the observation that “people are in the habit of building the sepulchres of the prophets their fathers stoned,” and put the matter at rest with the resignation that fixation is not the tempo of the law because it is not the pace of life. Indeed, a study of the labor cases induces the belief that our courts have been passing from case to case with no purpose other than to keep the peace. The judiciary, under such a theory, will be contended to be purchasing the vengeance of the opposition with appropriate concessions. This is highly paradoxical, in view of the general advancement to which the common law has evolved—an advancement which is said to be unprecedented with respect to the great systems either of the Roman Law or Modern Continental Law.

Emphasis has been placed upon the sovereignty of our judiciary in the realm of constitutional law.¹² Equal if not

termines the permissible ambit of peaceful picketing.

11. 18 F(2d) 166 (CADC 1927).

12. Ernst, *The Ultimate Power* (1937), *Booth, Government by Judi-*

ciary (1932). See also the dissenting opinion of Mr. Justice Stone in *United States v. Butler*, 297 US 1, 56 S Ct 312, 80 L Ed 477, 102 ALR 914 (1935).

greater emphasis can be placed upon the sovereignty of the judiciary in relation to the development and present state of our industrial law. For it cannot be gainsaid that the destiny of labor law and with it the direction and consequences of the American labor movement are intimately bound up with judicial disfavor on the one hand, or good will upon the other. It does not say well for the sovereignty of our industrial law that its rules have purported to go no further than to delineate new areas for keeping the peace. We need a philosophy of industrial law.

We have at hand a great body of juristic thought in the sociological school of jurisprudence as developed by its leading American exponent Roscoe Pound, but we lack a complete industrial philosophy of law *because we do not possess a body of sociological theory whose ideals are capable of translation into law*. The development of such a body of sociological conceptions is the responsibility of legal philosophy because the social sciences must be correlated to the means and ends of the law as a condition to their effective reception into the field of legal control. The complete absence of such a body of sociological conceptions attuned to the realizable ends of the law is alluded to as the *Great Hiatus*.

3. Sociological Jurisprudence

No one who has trod the gamut of juristic reasoning will deny the achievements of sociological jurisprudence. It has, firstly, pleaded for a return from the professional isolation which has characterized common law historical jurisprudence, to a study instead of the customs of popular action. The accidents of judicial pronouncements which were ennobled by a plausible reverence for custom needed the light of scientific investigation to expose the utter unworkability of customary tools of thought in a changing society. Students of the common law know too well, for example, the pigeon-holed writs which preceded and followed the Statute of Westminster II, and the judicial opinions which have shown a complaining litigant the door because his complaint was scandalous for reasons of novelty.

It has, for a second contribution, effectively exposed the delightful theory of syllogistic self-sufficiency by virtue of which analytical jurisprudence had reduced the judge to an automaton. Thirdly, it has argued away from the abstractions of philosophical jurisprudence, for a survey instead of the claims and counterclaims of men in active society. Its affirmative accomplishments are no less impressive. In distinguishing non-technically between rules, principles, standards and conceptions of the common law, and in setting forth both the more precise boundaries of the law as distinguished from other social institutions, and the limitations upon effective legal action, sociological jurisprudence has laid the foundation both for the reception by law of social facts to resolve the knot of competing principles, and the rational qualifications of that reception.¹³ In short, sociological jurisprudence would transform the common law from an insular body of retrospective, logical or abstract notions, into an effective reflection of the world outside the law.¹⁴

13. Pound, who is essentially a conservative thinker, has never lost sight of the interests of peace and security which are important concerns of the law. Hence he divides the legal order into problems concerning property and commercial transactions on the one hand, and human conduct upon the other. The requirements of uniformity and certainty in situations involving human conduct are far outweighed by the needs for individualization and social adaptation. Stability, says Pound, is such a social good in property and commercial transactions as to necessitate greater care in preserving certainty and predictability than in attempting to individualize factual patterns as they arise. See Pound, *Interpretations of Legal History*, p. 154. Jerome Frank, in his work, *Law and the Modern Mind*, pp. 207-218, criticizes Pound's divisions of the legal order. Individualization or

the ethical element, argues Mr. Frank, so pervades all the law as to make impossible any attempted boundary demarcation within which certainty is to be sought at almost all costs.

14. The propositions underlying the school of sociological jurisprudence are to be found in numerous works of Dean Pound, who is unquestionably its foremost American propounder. Outstanding writings by Dean Pound explanatory of sociological jurisprudence are the following: "The Theory of Judicial Decision," 36 *Harv L Rev* 641, 802, 940 (1923); "Juristic Science and Law," 31 *Harv L Rev* 1047 (1918); "The Scope and Purpose of Sociological Jurisprudence," 24 *Harv L Rev* 591, 25 *Ibid.* 140, 489 (1911); "A Theory of Social Interests," 15 *Papers and Proceedings of the Am. Sociological Soc.* 16; "Law in Books and Law in Action," 44 *Am Law Rev* 12; "Mechanical Juris-

These, to be sure, are mighty achievements. They mitigate the law's capacity for the irrelevant. They lay needful foundations for attack upon the marshes of faulty notions which have served to stagnate development of the common law. But they fail to constitute the sociological school of jurisprudence a philosophy of law, because, through self-imposed limitations, they halt where any efficient philosophy of law must start. Replying to a criticism on this point by a distinguished continental jurist,¹⁵ Dean Pound has stated: "Continental philosophical jurists generally feel strongly that we cannot go forward in jurisprudence until we have first settled fundamental questions of Epistemology and/or have determined the highest good. But philosophers have been debating these things since the Greeks first thought about them some twenty-three hundred years ago, and, if William James is right in his classification of men into soft heads and hard heads, are likely to continue to debate them indefinitely. Law is a practical matter, and the lawyer will be content with a well-laid out picture of the ideal element in the body of authoritative guides to decision and a philosophical critique of that element. Jurisprudence cannot wait for an ultimate solution of what thus far has proved unsolvable. A workable measure of values on which jurists starting from many philosophical standpoints and from any of the current psychologies can agree, is a necessity. More than that is a juristic luxury for which the Anglo-American lawyer is not inclined to look."¹⁶

prudence," 8 Col L Rev 605 (1908); "Legal Rights," 26 Int Jour Ethics 92. See also his following larger works: "Law and Morals;" "Interpretations of Legal History;" "An Introduction to the Philosophy of Law."

15. Radbruch, *Anglo-American Jurisprudence Through Continental Eyes* (1934) LQ Rev 530, 542.

16. Fifty Years of Jurisprudence (1938), 51 Harv Law Rev 444, 460. See also Holdsworth, *Some Lessons* 130

from our *Legal History* (1923) at p. 109. "English lawyers are not, and never have been, ready to receive and use as the basis of their reasoning the theories of legal and political philosophers," and Maitland's dictum about the judicial law in his "Collected Papers" iii, 319: "It has sound instincts, and muddles along with semi-personality and demi-personality towards convenient conclusions." Strangely enough, Pound has been criticized for going [Teller]

No argument can be found with such a viewpoint if we are to understand thereby that theories of natural rights or speculations metaphysical ought not to guide the living legal doctrine. Law is indeed a practical matter. Objection is made, however, to the statement that "the lawyer may well be content with a well-laid out picture of the ideal element in the body of authoritative guides to decision and a philosophical critique of that element," and that more than this is a "juristic luxury for which the Anglo-American lawyer is not inclined to look." The "well laid out picture of the ideal element" of our law which the school of sociological jurisprudence has advanced has, as has heretofore been stated, succeeded in substituting the sociological for the analytical, historical and philosophical element as a guide to the judicial decision.¹⁷ And the philosophical critique evolved by Dean Pound to conduct the ideal element of sociology over the field of the law has, as likewise heretofore stated, contributed to a better understanding of the internal characteristics of law and the limitations upon the extent to which the asserted social good can and ought to be translated into law. But what of the world outside the law? To practicing lawyers, the resolution of that world in terms of legal progress may well constitute a "juristic luxury." To jurisprudence, on the other hand, it is a present necessity.

When Dean Pound contends that "jurisprudence can-

too far. See, for example, Kunz, *The Vienna School and International Law* (1934) 11 NYULQ 370, where a follower of the Vienna School (Kelsen's "pure science of law theory") distinguishes between a theory of law and a philosophy of law, and relegates the latter to the fields of morals and politics, outside of the domain of law proper. Dean Pound had then been asserting that law exists not only to keep the peace, but also, and mainly, for the administration of justice. Hence philosophy of law was anterior to any legal theory; the outposts of the social

world were the proper guides to the judicial decision. He was consequently subjected to faultfinding for having converted into an artistic problem a field of inquiry essentially scientific. Now Dean Pound seems to have receded from his former position.

17. That this appears to be the meaning which Dean Pound ascribes to the phrase "ideal element" as employed in this connection, see Pound, *The Ideal Element in American Judicial Decision* (1931) 45 Harv L Rev 136.

not wait for an ultimate solution of what thus far has proved unsolvable" he may perforce mean to assert either the possibility of institutionalism as a solving factor of the judicial decision (i. e., the judicial decision can dispose by observation and without the responsibility of choosing) or the proposition that the law ought to leave to others the task of further sociological guides and conceptions (i. e., that even if choice be assumed to be necessary, the law ought nevertheless merely observe without choosing). It is submitted that in either event sociological jurisprudence thereby surrenders the benefits of any consequences which might have been expected to follow from analysis of the ideal element of the judicial decision and its philosophical critique. The validity of each possibility will be considered separately.

4. Institutionalism as a Solving Factor of the Judicial Decision

Fetish of science is an everywhere recognized late nineteenth and twentieth century characteristic. Ramifications of that fetish have incalculably permeated modern social thought. The behaviorists in psychology would accordingly have us understand that man is merely the reflex of his physiology. Hohfeld and especially Hohfeldians, dissatisfied with the law as a science in the Kantian sense of a body of knowledge, have instead stratified the law with artificial, growth stultifying but presumably scientific nomenclature. Disproportion in emphasis upon the scientific has not gone unchallenged,¹⁸ but the mainsprings of its influence are still current efficacies.¹⁹ Without prejudicing discussion by advancing the dogma that institutionalism derives its current popularity from that fetish, it cannot be gainsaid that respect for the consequences of scientific research has been an impetus to the sustenance

18. See Havelock Ellis's, *The Dances of Life*, and Morris R. Cohen's discussion of "Scientific Method" in *10 Encyclopaedia of the Social Sciences* (1933).

19. Cynicism is likewise a significant causative. See Veblen, *Theory of the Leisure Class* (1899) and especially Thurman Arnold, *The Folklore of Capitalism* (1937).

of institutionalism. "The cardinal tenet of institutionalism is that contemporary society is a complex of institutions or habitual forms for organizing and regulating the behavior of individuals."²⁰ Hence, contend the institutionalists, understanding of the complexity is a pre-condition to the formulation of any conclusion, and especially to the disposition of any controversy.²¹

In the field of economics, institutionalism has most outstandingly exerted its analysis and correspondingly demonstrated its consequences. It has, in the first place, basically criticized present day orthodox economy for its "static view of economic organization at variance with the actual processes of development,"²² its obstinate theories about human nature and of the social value of unrestricted competition. Institutionalists accordingly place more stock for understanding of present day capitalist society in Berle and Means's work on "The Corporation and Private Property" than in Marxian conclusions upon the one hand, and Liberty League oratory about the unmolested individual on the other. Classical economists especially of the *laissez-faire* school placed their confidence in individualism as a basis for the social order because they thought in terms of the production of wealth. Institutionalists have rightly insisted upon supplying the corrective of the distribution of that wealth, and the social consequences of one method as compared with another. Secondly, institutionalism has

20. 5 *Encyclopaedia of the Social Sciences* 387, 392 (1933).

21. Institutionalism is not merely a study of institutions. Its main-spring, to the contrary, and its current importance stem from the fact that it purports to be a *corrective process*. This involves a study of the field of controversy as a pre-condition to analytical research.

The law is sometimes said to be institutional, but in an entirely different sense: "The institutional character of the law depends upon the fact that it tends directly to connect men

together in cooperating groups for mutual assistance and common effort by enforcing the compacts on which such associations depend." Willard. *The Nature of Institutional Law* (1882). At times, however, the legal and institutional digress to the point where one is quite distinguishable from the other. See, for example, Moore and Sussman. *Legal and Institutional Methods applied to the Debiting of Direct Discounts* (1931), 40 *Yale LJ* 555.

22. 5 *Encyclopaedia of the Social Sciences*, 387, 391 (1933).

insisted upon the importance of relating the economic life with law, psychology and the social sciences. And it has here most profoundly demonstrated its successes.

The weaknesses of institutionalism, however, predominate. Statistical tables are rarely trustworthy. An ill-conceived two volume treatise published by leading American businessmen in 1929 preceded the greatest economic crisis of our country fully documented by charts upon the basis of which the authors predicted confidently that "our situation is fortunate, our momentum remarkable."²³ What is perhaps more to the point, institutionalism lacks demarcations of a field of inquiry, underlying assumptions, postulates and conclusions.²⁴ A consequence, for illustration,

23. See Ginzberg, *The Illusion of Economic Stability* (1939) where the treatise referred to in the text is subjected to exhaustive analysis.

24. "The growing use of quantitative methods is the most promising development in contemporary economics. But it will prove relatively sterile if it does not lead to a renaissance of theory." Young, "The Trend of Economics," *Quarterly Journal of Economics* (1925), p. 167. See also Professor Lionel Robbins, "An Essay on the Nature and Significance of Economic Science" (1935): "In the last ten years there has been a great multiplication of this sort of thing under the name of institutionalism 'Quantitative economics,' 'Dynamic Economics' and what not. Yet most of the investigations involved have been doomed to futility from the outset, and might just as well never have been undertaken," p. 12. The prevalence of institutionalism is at least partially explained by its excellence as an educational method. Institutionalism has tried to be something much more than a mere method of instruction, and has thereby come into waters deeper than its ability to keep above surface. See Robert S. S. 14

Lind "Book Review" 2 *Science & Society* No. 3 at p. 398: "The current impotence of the social sciences is traceable in no small degree to the cult of objectivity. . . . Realism and refined statistical techniques applied to empty problems amount only to footnoting the trivial." See also John Dewey, *Logic The Theory of Inquiry* (New York, 1938), p. 619. "The history of science, as an exemplification of the method of inquiry, shows that the verifiability (as positivism understands it) of hypotheses is not nearly as important as is their directive power." Two further reasons have been assigned for the current popularity of institutionalism: (1) "Multiple Causation became the rallying cry of those who opposed or feared Marxian thought. Representing the middle ground between Marxism and traditionalism they sought in historic continuity for the laws of progress. . . . It tends to bolster the status quo and to inhibit revolutionary action." 14 *Ency. of the Social Sciences*, p. 150, Title "Social Process;" (2) "The scholar remains favorable to multiple causation because it provides him with an instrument for criticizing all one-sided theories. Moreover, he asks

has been the lack of clarity surrounding the questions whether institutional economists proceed upon the theory that capitalism, a desirable institution, ought to be reconstructed to reflect modern circumstances, or whether, on the other hand, they believe that capitalism, an assumedly undesirable theory of economy and government, ought constantly to be modified in the direction of a state prepared to take over peaceably and orderly an alleged decaying capitalist structure when it falls. In this respect institutionalism is defense mechanism for bewilderment.

More serious is the belief upon which institutionalists seem to proceed, that social study can be carried on without the penetration of viewpoint or bias. Consequently, institutionalism neither affords nor professes to afford any clue to the extent to which society ought to accept, reject or modify a given set of social circumstances. The social sciences are too intimately associated with eccentric and hence incorrigible human values to permit of such formula, rigid rule and generally accepted conclusion. Economic, religious and political convictions are too often the disposing circumstances of social problems. Nor is this an unfortunate circumstance, for, as has been observed, God should be presumed to have given man sense in amount decent enough to determine his own interests. Indeed, the man well able to take care of his own economic and social domain while equally undisposed or inept to project a similar interest upon the field of social problems is the rule and not the exception. Intellectual prepossessions have correlated with evolutionary circumstances to create and mould drives not easily ascertainable by study however sincere, of established institutions. The ink of Blackstone's Commentaries was not yet dry when Bentham's utilitarianism rocked their foundations, only itself to prompt a movement laying renewed emphasis upon the in-

that he be not expected to make constructive social proposals. The ivory tower is fortified by a multiplicity of variables. Problems are too complex to take sides on. This curious episte-

mological reasoning buttresses in efficient fashion the resolve never to take a stand." Feuer, *The Economic Factor in History* (1940), 4 *Science and Society* 168, 174-175.

dividual. The difference between Blackstone and Bentham is not one discoverable in laboratory experiment nor can the truth or falsity of their respective positions be demonstrated thereby. The difference is rather one involving the deepest sort of human activity—the formulation of human values, and the proposed method whereby those values can best be achieved. Underlying the whole assertedly scientific system of Marxism, for example, is a notion of the individual in relation to society, a notion which enabled John Reed to adopt the Marxist belief with nought else but an emotion about the dignity of the individual to qualify him for the tasks of that philosophy. The progress of mankind involves factors more courageous, even if more subjective and unverifiable, than the statistical chart.

The shortcomings of institutionalism find translation in the law. Realism in the appraisal of the facts in modern society has, to be sure, contributed a substantial measure of more intelligent legal doctrine. The era of the Restatement is the epitome in law of the work of the institutionalists.²⁵ Rules widening the ambit of tort liability²⁶ and extending the area of warranty in the law of sales²⁷ have made inroads upon the common law notion of privity of contract to the extent of strong judges' ability to evaluate the characteristics and consequences of modern transactions. Indeed, the present state of our judicial labor law compares so favorably with the hide bound conglomeration of anti-labor cases found in the books during the later 19th

25. The object of the American Law Institute, sponsors of the Restatement, as expressed in its charter, is "to promote the clarification and simplification of the law and its better administration of justice and to carry on scholarly and scientific legal work."

26. *Ultramares v. Touche*, 255 NY 170, 174 NE 441 (1931); *State Street Trust Co. v. Ernst*, 278 NY 104, 15 NE(2d) 415 (1938); *MacPherson v. Buick Motor Co.* 217 NY 382, 111 NE 3850 (1916); *Pine Grove Poultry* 216

Farm v. Newton Hy-Products, 248 NY 293, 162 NE 84 (1928); *Smith v. Peerless Glass Co., Inc.* 259 NY 292, 181 NE 576 (1932); *Jeanblanc, Manufacturers Liability to Persons other than their immediate vendees*, 24 Virginia L Rev 134 (1938); *Bohlen, The Basis of Affirmative Obligations in the Law of Tort* (1905), 83 U of Pa L Rev 209, 237, 337.

27. *Dothan-Chero-Cola Bottling Co. v. Weeks*, 16 Ala App 632, 90 S 724 (1918); *Williston on Sales*, secs 244-244a.

and earlier 20th centuries because judges have looked more closely upon the claims and counterclaims of men engaged in industrial strife. Similarly, the law has gained stature from a certain degree of correlation with social sciences with resultant ideals, for example, that greater and more effective clamor is heard (to take random illustrations) for speedy administration of the civil and especially the criminal law, for a system of punishment fitting not only the crime but also the needs of the individual, for modification of the doctrine of consideration to allow of a rule giving effect to the given contract according to the tenor of the parties' intentions in a meaningful transaction.

Beyond these solutions lie competing social, public and individual interests contending for resolution of conflict. Emphasis, not generally accepted notions of inquiry, is here the solving factor. The question of labor injunction or no labor injunction, of legal or illegal boycott, of social justification to commit what would otherwise constitute a tort, of the notions, permissibility and results of collective bargaining, involve social policy not discernible in statistical charts or by social photography. The need for blueprints of that social policy is the urgent necessity of present day philosophy. We shall pass on to the problem as to whether it is properly the task of the law to evolve that philosophy.

5. Rejection of Choice as a Solving Factor of the Judicial Decision

Rejection of choice involves three mistaken notions. The emergence of choice as a frankly espoused solving factor of the judicial decision has been prevented by adherence on the part of outstanding juristic thinkers to these notions.

The first proceeds upon the belief that observation is a sufficient guide to the judicial decision. The baselessness of such a belief can best be illustrated by Dean Pound's story of an editorial writer "who wrote upon Chinese Metaphysics after reading in the *Encyclopaedia* under China

and Metaphysics and combining the information."²⁰ The incursion by law into the conditions of society in search for a guiding political economy is bound to be as fruitless as the efforts of Dean Pound's editorial writer unless the link connecting the field of law with the field of social facts is made of sterner stuff than the mere conjunction of respective findings.

The second assumes that the content of our present law reflects past observation rather than choice. Legal rules now commanding obedience which reflect sociological choice stand in the way of such a contention. Illustrative is the rule striking down all contracts in restraint of trade, as is also the equity maxim that defamation, to be actionable, must be injurious to a property interest; the rule against perpetuities is also a striking example. They reflect the common law emphasis upon property and free enterprise. We have here also the substantiating observation of Dean Pound that "our Anglo-American legal system is intensely individualist." It conceives that a paramount social interest is in the securing to each individual his private rights, that is, those capacities of action and powers of influencing others through the forces of the state which are requisite to secure and protect certain spheres of interest upon which his individual activities depend, or about which they center.²¹ In point, too, are the many rules which taint with illegality bargains freely entered into, whether as usurious, speculative or involving marriage brokers, and a host of others to be found in the law cases and in the contract texts. Would the sociological school of jurisprudence relegate the subject of illegality to legislation? We need not here prejudice the discussion with deterministic analysis as to how these rules evolved. The point is they bear the imprint of legal incursions into non-legal fields, and the choice resulting from that incursion. In the civil law there is a rule which holds that a contract constitutes the law between the parties. Hence provisions for a penalty or a

²⁰ In the introduction to his book, *The Introduction to the Philosophy of Law*.

²¹ Readings in the History of the Common Law, p. 410.

forfeiture therein contained are legally enforceable. The common law holds otherwise. The parties are free to make contracts, to be sure, but the extent of their enforcement is hedged in by conceptions of law and equity jurisprudence in addition to restrictive rules of law which must surely make the layman suspect any jurisprudence which would inform him that all this is merely legal observation of the social scene. It is precisely in accord with common law dogma and the wider field conceived as a body of sociological ideals expressed through exercise of the legal sanction, that sociological jurisprudence must stand criticism for its failure to go far enough, and for its insistence that jurisprudence must go no further. It can now be said of our jurisprudence what Henry Adams said in despair of historians "Historians turned to the collection of facts as the geologists turned to the collection of fossils." To say that the task of modern judicial law is but to observe and not to choose is to argue that the judiciary must apply the choice of former years to the facts of present day life. The doctrines of conspiracy as applied to the strike, the picket and the boycott are no part of the ten commandments. They reflect, rather, the values placed upon property by judges sitting in former centuries. Judges, not legislators, extended the injunction from its simple habitat as a mandate having to do with land into the field of labor disputes as an elaborate method for governing the relationship between employer and employee. Judges too, sanctioned the trickery involved in the yellow-dog contract, which utilized one bargain helplessly entered into by an employee, to condemn the activity of labor organizations otherwise justified upon the very same assumption of the employee's inferior powers in the bargaining process.³⁰ Judges, in short, moulded the very pillars of legal doctrine which our present leading school of jurisprudence would now deny to judges authority to change. There is cause to wonder over the context of a sociology which seems to have become

30. Both employers' organs and labor organizations have condemned utilization of yellow-dog contracts. See *supra*, section 48.

an appendage to jurisprudence solely for the purpose of stifling its further development. The law is a part of life. Theory which would justify the inbreeding of legal rules and principles stifles the life of the law, and thereby destroys its effectiveness as an instrument of social control.

Our courts, or at least the stronger among them, have *fortunately been wiser than our jurisprudence would want them to be*. The story of the strike is a record of judicial choice, not observation. Its history from early beginnings when the judge-fashioned crime of conspiracy was indiscriminately applied to its exercise, through later days when its employment in primary labor disputes involving wages, hours and other conditions of employment was generally taken for granted, to modern times when the rationale of its underlying theory in cases involving unionization and secondary labor claims has been gradually achieving qualified recognition, is interwoven with the hopes of our American democracy. Likewise the picket and the boycott

The third and final miscalculation is found in the contention that the law ought not to take sides. Here it is most proper to interpose a plea of confession and avoidance. For a deeper aim in the forging of the link between law and sociology is to obviate the possibility of criticism for prejudice to which the common law of labor disputes has, and with too great a measure of truth, subjected itself. It is precisely because the formulation of social and individual value patterns should not be the primary concern of a philosophy of law that it is the tasks of an intelligent legal philosophy to weed out the ancient prejudicial driftwood, to erect a system of thought designed to achieve the fair settlement of industrial controversies, and finally to strike down private employer-employee arrangements which impede the realization of this achievement.

We have, then, the task to determine the social frame of present-day reference—the world we live in. We shall then and only then be prepared to subject the law as laid down in judicial decision to a more intelligent inquiry. We shall not be content with mere tabulation of immediate social cir-

circumstances. We have in mind, rather, an analysis suitable for the legally realizable settlement of disputes over individual values and social conceptions. Specifically, the following pages will be concerned with the answers to the following three problems, and the implications of those answers: First, can we, in the present state of our sociological theory, point to underlying assumptions of American thought, and if so, what are they? Second, ought the law to reflect these assumptions, and if not, why not? Third, can a realizable strategy be invoked for the intelligent growth of our judicial industrial law? It is hoped thereby to accomplish the tasks above indicated, of a modern industrial philosophy of law.

6. *Liberalism*

Re-evaluation of the precepts and consequences of liberalism in the light of present social and economic circumstances is a stereotype of modern intellectual effort.³¹ Indeed, it has been observed that each generation seems to live the life of a limited number of underlying assumptions, with the validity of which thoughtful men and thoughtful books will be found to be grappling.³² Liberals are generally agreed that the stalemate of present day progressivism is attributable to failure in application of the principles of liberalism.³³ It is likewise generally assumed collaterally that the principles of liberalism will yet survive, and that the triumph of liberalism will be realized when its fundamental achievement (the liberated individual) is allowed to control the destiny of men, free from some of the fallacies into which liberalism has fallen at the hands of imperfect understanding and fortuitous development.

31. See Lippmann, *The Good Society* (1937); Lerner, *It Is Later Than you Think* (1939); Hocking, *The Lasting Elements of Individualism* (1937); Dewey, *Liberalism and Social Action* (1937); Laaki, *The Rise of Liberalism: The Philosophy of a Business Civilization* (1936).

32. See Morris R. Cohen's preface to Tourtuloun, *Philosophy in the Development of the Law* (1922).

33. See Lippmann, *The Good Society* (1937); Hocking, *The Lasting Elements of Individualism* (1937); Dewey, *Liberalism and Social Action* (1937).

Failure, however, to agree upon the very meaning of liberalism, coupled with like failure to advance any plan of social organization or outline of any manner by which the liberated individual might project his individuality into the social order, have reduced liberalism to a speculative conception, incapable of entering upon the tough task of disciplining conflicting wills, and hence inappropriate to the job of bridging the gap between law and the social order. This is not equivalent to a complaint that liberalism possesses no generally agreed upon program, for theories even concrete have too often been known to be weakest at the points of panaceas. The equivalence is rather to a word which once had meaning in the context of the industrial revolution, which has lost that meaning in the rush of countervailing sociological experience, and which nevertheless remains as a catch-word for thoughts individual to the thinker.

Thus, for example, Professor Dewey sees the genesis of liberalism in a desire "to liberate a group of individuals, representing the new science and the new forces of productivity, from customs, ways of thinking, institutions, that were oppressive of the new modes of social action, however useful they may have been in their day."³⁴ The logical destiny of the liberal idea is socialism: "organized social planning, put into effect for the creation of an order in which industry and finance are socially directed in behalf of institutions that provide the material basis for the cultural liberation and growth of individuals, is now the sole method of social action by which liberalism can realize its professed aims."³⁵

Mr. Lippmann, on the other hand, views the origin of liberalism in terms of an outright economic conception, as the "division of labor in a free market" designed to facilitate an exchange economy. Liberalism, in this sense, is an economic contribution of the industrial revolution. What Professor Dewey sees as liberalism is merely his

³⁴ Dewey, *Liberalism and Social Action* (1937), p. 86.

³⁵ Dewey, *Liberalism and Social Action* (1937), p. 87.

own notion of some of the metaphysical consequences of the liberal economy. Mr. Lippmann's conclusions in connection with the logical destiny of liberalism involve such limitations upon labor activities and governmental intrusion upon free enterprise, as to suggest the necessity for a fascist state.³⁶

Professor Hocking contends for an origin of liberalism radically different from that conceived either by Professor Dewey, or Mr. Lippmann. The liberal way of thinking, says Professor Hocking, is the *maturity* in the 19th century of a long struggle by the individual for emancipation, a struggle which has a long history antedating even the Christian era.³⁷ Hocking's contention is thus seen to be at odds with Dewey's, since the latter sees liberalism as the *origin* of a distinctly new theory, and not as the *maturity* of an old one. With Lippmann, Hocking is palpably at odds, calling the prevailing notion which would identify individualism as a product of the economic forces of the late 18th and early 19th centuries, "a flat psychology of the present moment."³⁸ Consequently, Hocking visions a destiny for liberalism neither socialist nor fascist, but one distinctly his own, which involves compromise between the strong state and equally strong individuals united by a "commotive function."³⁹

Professor Laski argues for a highly economic deterministic theory of liberalism. "The liberty of liberalism," says Laski, "is set in the context of property." Liberal-

36. See Lippmann, *The Good Society* (1937), chapters 6, 13, 14, 15

37. Hocking, *The Lasting Elements of Individualism* (1937), p. 87.

38. Hocking, *The Lasting Elements of Individualism* (1937), p. 87.

39. It is difficult to evaluate Hocking's "commotive function" in relation to our profit system. Instinct in capitalist individualism are the notions of economic segregationism and consequent psychological empha-

sis upon the right to privacy. Ideals are difficult to achieve in the face of countervailing conceptions. Fascism must therefore contrive a fictional superstructure of jingo whose very ideal runs the gamut of a contradictory economy. Communism can more honestly profess a "commotive function" in this sense, because its totalitarian characteristics permeate its entire sociology, including the life of its economic, social and political man.

ism, under the Laski view, is the "philosophical justification of capitalism."⁴⁰

A far cry from the current intellectualist theories about the nature of liberalism is that nicely stated by Guido De Ruggiero in the *Encyclopaedia of the Social Sciences*:⁴¹ "In its larger sense, liberalism is a deep lying mental attitude which attempts in the light of its presuppositions to analyze and integrate the varied intellectual, moral, religious, social, economic and political relationships of human society. Its primary postulate, the spiritual freedom of mankind, not only repudiates naturalistic or deterministic interpretations of human action, but posits a free individual conscious of his capacity for unfettered development and self-expression." For the reason which follows from De Ruggiero's definition, positionists have scorned liberals as occasional hole-pokers, who exercise the platitudes of random reform upon an immense sea of social trouble.

"There is in each of us a strain of tendency," wrote the late Mr. Justice Cardozo,⁴² "whether you choose to call it philosophy or not, which gives coherence and direction to thought and action." It is a tragic commentary upon the efforts of modern philosophy that its current assumption liberalism is so woefully lacking in such a "stream of tendency." Theories of social action prerequisite an intelligent evaluation of the problems of the world we live in, coupled with a practical, realizable strategy. Liberalism appears to be incapable of such achievements; the consequence has been a deplorable miscalculation of the realities of modern political economy. The paradoxes of permanence and change, of dogma and relativism, and of the dominant state with respect to its free individuals have been dealt with in terms of opposing thought conceptions lacking both program and strategy. The specific conse-

40. Laski, *The Rise of Liberalism: The Philosophy of a Business Civilization* (1936), p. 238.

Ency of the Soc Sci 436 (1934).

42. Cardozo, *The Nature of Judicial Process* (1921), p. 12.

41. De Ruggiero, *Liberalism*, § 224

quences of these miscalculations are serious obstacles to any realistic evaluation of present day problems.

It is clear that the tool of liberalism is unequal to the task of constructing the framework of a social order. Freedom may, as Thomas Mann contends, be rooted in the dignity of man,⁴³ but it is helpful to work out an explanation of the manner in which that freedom may be implemented by power to achieve social consequences, for power, to quote Bertrand Russel,⁴⁴ is the fundamental concept in social science as energy is the fundamental concept in physics. It is submitted that an effective theory of social action, whose consequences are realizable in terms of legal doctrine, may be found in application, to the field of labor relations law, of the notion of pluralism governed by a democratic sovereignty in an enterprise society.

7. Pluralism Governed by a Democratic Sovereignty in an Enterprise Society.

Because centuries of statehood (sometimes in practice, as during the middle ages, while at other times in theory only, as under feudalism) preceded democratic society, personification of sovereignty was transplanted to a social structure utterly unsuited to notions of traditional state rulership. Democracy is a society which proceeds upon the theory that the people, by free thought and free action, can achieve a social order. The democratic regime is a synthesis of opposing forces.

Hence the democratic order is seldom more than an approximation of the socially desirable. It is desirable, for example, that all criminals without exception be punished, within the framework, of course, of theories about criminology. Nevertheless there is tenacity in the manner in which we adhere to the many technical rules of evidence in criminal cases, even in the face of obvious criminality or guilt, with the thought that it is better for some guilty men to go free than for one innocent man to be tainted

43. Mann, *The Coming Victory of Democracy* (1938).

44. Russel, *Power: A New Social Analysis* (1938).

wrongfully with the tarnish of guilt. So also, that men may be free to speak without fear of prior restraint, we sanction monstrous falsehoods and trade libels without subjecting them to the mandate of injunction. The impulse which stays remedial legislation or other legal doctrine is generally found in the thought that law adopted to exterminate the evil might ultimately prove to be worse than the evil itself, and that free thought and free action, and care in legal administration, are worth their cost to society.

Hence also, and what is more to the point of our discussion, democracy sanctions the evolution of law by private law-making groups. Pluralism, in other words, is instinct in the notion of democracy. "The term pluralism is applied to the somewhat varying doctrines which find a common basis in their common opposition to the traditional theory of state sovereignty. The general position of the uncompromising pluralist is that since the orthodox, or classical theory, ignores or takes inadequate account of the rights, interests and actual achievements of various associations smaller and more specialized than the state, political philosophy should surrender the 'whole conception of sovereignty' and particularly should surrender the 'arid' and 'unfruitful' conception of legal sovereignty."⁴⁵

Decentralization of the control mechanisms of society has been going on in the field of labor relations at a pace

45. Coker Pluralism, 6 *Ency of the Soc Sciences* (1933), p. 170. See, for literature connected with pluralism, Hsiao, Kung-Chuan, *Political Pluralism* (London 1927); Laski, *A Grammar of Politics* (2d ed London, 1920); Laski, *Studies in the Problems of Sovereignty* (New Haven 1917); Willoughby, *The Ethical Basis of Political Authority* (New York 1930). See, for a more comprehensive bibliography, 6 *Ency of the Soc Sciences* (1933), p. 174.

Laski, perhaps one of the most virile of the advocates of pluralism, had a special interest in trade unions.

It now appears that Laski has abandoned pluralism for the Marxist viewpoint, that the state, which is the synonym for the dominant economic interests, must be captured, instead of its existence being denied, if its inhabitants are to be the beneficiaries of the social order. See Jafer, *Law Making by Private Groups* (1938), 51 *Harv L. Rev* 201, for a criticism of United States Supreme Court doctrine which, under the guise of forbidding undue delegation of powers, has adopted an anti-pluralistic view of the methods of social control.

[1 Teller]

so rapid as to preclude present description of future outlines or consequences. The "Appropriate Bargaining Unit" under the National Labor Relations Act, for example, has been construed by the National Labor Relations Board to give to labor organizations almost carte blanche authority to determine the appropriate unit by such factors as rules of eligibility, extent of organization, history of bargaining and desires of the workingmen themselves.⁴⁶ Minority labor groups thus find their autonomy impaired if not destroyed by action taken not by the government but by the wills of other private groups. Again, collective bargaining agreements have become weighty documents which include elaborate provisions for the regulation of competition, and for the conclusive settlement of disputes.⁴⁷ Indeed, arbitration tribunals of trade associations have taken away from the law courts a substantial number of justiciable controversies, for private group settlement.⁴⁸ Still again, collective bargaining agreements have begun to take on the character of norms in the industry, to which even non-parties to the agreement, whether workingmen or employers, must conform.⁴⁹ In our constitutional law we have placed great emphasis upon the ban against undue delegation of powers, and the NIRA was declared unconstitutional partly for the reason that private industry was delegated the law making function.⁵⁰ Nevertheless, collective bargaining agreements have been given normative effect at common law,⁵¹ by the Fair Labor Stand-

46. See *infra*, sections 339-358. An exception to the general principle giving labor unions the right to choose and fix appropriate bargaining units is the "Globe Doctrine," to which the Board presently adheres (See *infra*, section 355) by virtue of which craft-industrial disputes are resolved by vote of the craft groups who are given the right to determine whether they wish to retain their autonomy or whether they wish to be connected with the larger, industrial group.

47. See *infra*, sections 154, 173-175.

48. See Phillips, *Rules of Law or Laissez-Faire in Commercial Arbitration* (1934), 47 *Harv L Rev* 590 (1934).

49. See *infra*, sections 173-176.

50. *Schechter Poultry Corporation v. United States*, 295 US 495, 55 S Ct 837, 79 L Ed 1570, 97 ALR 947 (1935).

51. See *infra*, sections 173-175.

ards Act of 1938,⁵² by so-called anti-kick-back statutes which forbid the payment of wages less than provided in collective bargaining agreements,⁵³ and by government purchase enactments which fix wage conditions or authorize the fixing of such conditions to accord with the provisions contained in collective bargaining agreements.⁵⁴

The notion of pluralism is not unknown to our legal system. Indeed, in the famous *Coronado* case,⁵⁵ the United States Supreme Court took cognizance of private groups powerful enough to contend for areas of influence, to the extent of holding such groups or associations, though unincorporated, to constitute legal entities.⁵⁶ Nevertheless, we seem to have overlooked the implications of the *Coronado* case, with the result that the impulses which have directed the development of American labor law have been neglected and miscalculated. "The labor movement," John A. Fitch has written,⁵⁷ "seeks not alone the interpretation and application of existing law, but the positive achievement of new law." This is a statement at war with traditional notions about sovereignty, but at peace with the principles which underlie pluralism. No one can deny that we have gone a long way from the time when labor organizations and their doings were proscribed through use of the vaguely bounded doctrine of conspiracy. Nor is it fortuity that labor law is more favorable to labor in states where labor unions are more firmly entrenched, and their contentions the more clearly understood. This means, of course, as has been seen,⁵⁸ that judges have been making law right along, although they have not said as much. But it means something in addition—that private groups have quarreled with existing legal doctrine, and have in some instances succeeded in qualifying that doctrine, without resort to

52. See *infra*, sections 176, 402.

53. See *infra*, section 176.

54. See *infra*, section 413.

55. *United Mine Workers v. Coronado Coal Company*, 259 US 344, 42 S Ct 570, 66 L Ed 975, 27 ALR 762 (1922).

56. See, for a discussion of the reasons which the court gave in the *Coronado* case for its holding, *infra*, section 463.

57. Fitch, *Strikes and Lockouts* (1934), 14 *Ency of the Soc Sciences* 419, 425.

58. See *infra*, section 463.

legislation, but by the process of asserting a right, by continuing the exercise of the practice allegedly proscribed by existing law, by indicating in innumerable instances the social and economic consequences of that practice, and finally winning over approval of the judiciary to continuation of the practice. The "economic brief" has as one of its aspects in connection with newly asserted labor rights the task of acquainting the Court with the extent to which private groups have been attempting to mould the law to fit their needs and desires.

In terms of labor relations law, application of the principles of pluralism governed by a democratic sovereignty in an enterprise society includes at least four guiding principles. First, the idea of freedom of contract should be discarded, and the notion of collective bargaining adopted in its stead. Second, necessity for recourse to force and violence should be obviated. Third, labor organization should be encouraged. Fourth, sight should not be lost of the fact that ours is an enterprise society based upon initiative and profit.

Substitution of the notion of collective bargaining for the idea of freedom of contract has been the subject of so many discussions that little can be added to the weight of what has already been said. It has been seen that the foundation of American labor law is the assumption that workingmen are unequal individually to the task of bargaining, and note has been made of the sway of decisions depending upon the extent of this inequality.⁵⁹ Individual bargaining by workingmen involves an illusory and not a real freedom. But the argument is often heard that collective bargaining often means submerging the wills of the minority group of workingmen who may and many times do disagree with the policies adopted by the collective bargaining unit. The answer, that majority rules is nothing new to democratic ways, would appear to be a satisfactory one. But, it will be said, may not the minority break away and form its own union? It would seem to be preferable for the minority to be re-

59. See *supra*, section 59.

quired to win over enough adherents within the organization, for we have learned by too many costly jurisdictional controversies that collective bargaining is hindered by the infliction of harm upon guiltless employers by competing labor groups. Attempts to utilize existing anti-injunction acts as supplemented by labor relations laws to work out a peace period in connection with jurisdictional disputes have failed.⁶⁰ The rights of free speech, especially in connection with the growing identification of picketing with that right,⁶¹ will often if not always enable one group to inflict harm upon an employer as a means of destroying another group. If collective bargaining is to be a workingman's right and an employer's duty, it is reasonable to expect the collective bargaining unit to be a cohesive and single peace securing unit, and not a multiple and strife provoking unit. "It must be plain," as stated by a *Pennsylvania Court*,⁶² "from a long view and from the reaction that is already noticeable among the natural friends of organized labor that a continuance of fratricidal struggle between the two national organizations of organized labor must result in the withdrawal of the advantages that have arisen from the friendly attitude of state and national legislative bodies toward collective bargaining and the favorable opinion of the general public."

If, on the other hand, collective bargaining is to have the desirable social consequences which present judicial decisions and legislation ascribe to it, it must be free bargaining, unconstrained externally. Compulsory arbitration of labor disputes is an improper intrusion upon the bargaining process contemplated by collective bargaining. In the first place, compulsory arbitration of labor disputes assumes a static labor law, an assumption at variance with the pluralist conception which is the drive of labor relations law. The achievement of new rights, as has been seen, is a constant purpose of the labor movement. Secondly, the difficulty of determining acceptable arbitrators in the light

⁶⁰ See *infra*, sections 132, 211.

⁶¹ See *infra*, sections 135-140.

⁶² *Pando v. Bartenders' Interna-*

tional Alliance, 2 CCH Lab Cas 369 (Penna Ct of Com Pleas, 1940).

of labor's fears that private property and the institution of the profit system unqualified by labor's claims might well be the background against which arbitration will be held, would interfere with harmonious working of the system. Thirdly, the preliminary bargaining process is many times apt to become a formality, and the bargaining process transformed into a judicial process, as distinguished from a process of give and take. Finally, labor identifies the right to strike or otherwise to engage in labor activity with the warp and woof of democracy. Labor has often, it must be admitted, sacrificed economic weapons for voluntary arbitration. But the use of such weapons to achieve new rights and to secure existing rights is inseparably bound up in the American labor movement. In the absence of social circumstances which do not presently exist, disturbance of the balance which has been struck between the forceful and bargaining aspects of the labor movement ought not to be attempted.

It remains to state that, if collective bargaining as a new category is to be given full legal recognition, our constitutional law will need to recognize as a solid principle the validity as against the claim of class legislation, of statutes exempting labor relations from traditional legal doctrine.⁶³

Obviating of any necessity for recourse to force and violence as an alternative to collective bargaining should always be a primary concern of labor relations law. Encouragement of the process of collective bargaining, such as results from Section 8(5) of the National Labor Relation Act,⁶⁴ has done much to relieve resort to forceful weapons, whether by the employer in the form of strikebreaking methods or by employees in the form of violent picketing, or sit-down strikes. In requiring efforts at settlement as

63. See *supra*, sections 435-436, 455-456, 465, for the present state of the law governing the validity of legislation exempting labor unions or labor activities from general law, such as the law governing injunctions, conspiracy, suability or liability of unincorporated groups.

A converse proposition is that doctrines of labor relations law are unsuited for extension to non-labor fields. See *infra*, section 134, for an analysis of the legality of picketing in non-labor disputes.

64. See *infra*, sections 326-332.

a condition to the issuance of a labor injunction, the Norris Act,⁶⁵ and prototype state anti-injunction acts⁶⁶ have connected the bargaining process with the labor injunction in a manner to bring thoughts of and activities aimed at settlement into the field of industrial conflict.

That the law should encourage the growth of labor organizations is something new to our jurisprudence. The first significant codification of such a responsibility was contained in the National Labor Relations Act which, without precedent, has given to self-organization among workmen a right of enforcement as distinguished from a right of sufferance at the hands of the common law. Extension of labor organization into new areas means the mapping out of new fields of collective bargaining, as substitutes both for the undesirable consequences of individual freedom of contract among employees, and the socially harmful consequences of industrial strife.

Finally, as an underlying and correlating principle as well, the kernels of enterprise, individual initiative and the profit motive, must be preserved within the framework of existing conditions.⁶⁷ The extent to which collective bargaining agreements have been including more and more

65. See *infra*, section 221.

66. See *infra*, section 434.

67. The position has been taken in this work (see *supra*, Section 75) that the legality of labor activity depends not upon the analogy of competition but upon the larger basis of social justification. It needs to be reiterated here that labor activity is basically inconsistent with the competitive economic world, that labor activity has qualified the enterprise nature of our society to the extent that labor organizations have extended their sphere of influence. When it is said in the text that the kernels of enterprise must be preserved within the framework of "existing conditions," it is meant thereby that the development of the no-

tions and the consequences of collective bargaining have qualified to be sure, free trade as it was known in the late 18th, 19th and early 20th centuries, but has not at all destroyed it. Indeed, enterprise must be retained as the drive of life and the cornerstone of the economic structure. Neither protective tariffs nor rules of unfair competition have essentially impaired the enterprise nature of our society, there is no reason to believe that the conception and incidents of collective bargaining properly applied and limited, while adding, to be sure, an additional qualifying feature to the number of others which now modify *laissez faire* enterprise, should impair the essential core of our enterprise society.

provisions regulating the given industry under the guise of "stabilization"⁶⁸ ought soon to be the subject of a thoroughgoing study. Again, the legality of strikes, picketing, or boycotting, or other forms of labor activity carried on to compel an employer to join an employers' association or to become party to a collective bargaining agreement,⁶⁹ is not at all free from doubt. The aim of such labor activity, it is said, is to unify employment conditions throughout the industry, and to insure better discipline in connection with enforcement of collective bargaining agreements. There is argument for the proposition that the task of enforcement is the responsibility of the labor union and not that of the employers' association. An employer willing to abide by the terms and conditions generally prevailing throughout the industry is not necessarily unreasonable in refusing to become party to the general collective bargaining agreement prevailing in the industry, nor in refusing to join an employers' association. The stifling of competition and free enterprise developing from the continued activities of employers' associations is also a matter requiring circumspection and further study. Activities of organized labor designed to prevent introduction of labor saving machinery,⁷⁰ or protesting other business policies,⁷¹ should be tested in the light of the enterprise nature of our economic system.

Retention of the basic principles of enterprise contemplates that workingmen as well must be protected against incursions upon their rights to the free and open market which are unrelated to the necessary consequences of collective bargaining notions. The artisan's patrimony has been woefully neglected by the common law.⁷² Thus, for example, combinations to blacklist employees employed under at-will terms of employment have gone unpunished⁷³

68. See *infra*, sections 173-175

69. See *infra*, sections 102, 173-175

70. See *infra*, section 80

71. See *infra*, sections 89, 114.

72. See *supra*, sections 11-23, for

an analysis of the "right to a free and open market" and the extent of the common law's recognition of such a right.

73. See *supra*, section 12, and *infra*, section 472.

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because of specious regard for the combining employers' right to do collectively that which they have the right to do singly, and counterpart disregard for the workingman's right to seek employment in a free and open market. So also, the closed union has been permitted to enter into closed shop contracts which deprive competent workingmen in the field of employment opportunities.⁷⁴

Survival of the principles of pluralism governed by a democratic sovereignty in an enterprise society depends largely, to be sure, upon the resolution of world events which, even at the present writing, threaten to cloud the achievements of the centuries. It has never been truer than it is today that we have been building our cultures "by huddling together, nervously loquacious, at the edge of an abyss."⁷⁵ The frame of reference which is here proposed for the development of American labor law may be impaired if not destroyed by countervailing forces. But other things will be destroyed as well.

74. See *infra*, sections 98-100, especially 99.

75. Burke, *Permanence and Change* (1935), p. 351.

PART III

STRIKES, PICKETING AND BOYCOTTING

CHAPTER SEVEN

THE STRIKE

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Section 78. Definition and Essential Nature.

The word "strike" in its broad significance has reference to a dispute between an employer and his workers, in the course of which there is a concerted suspension of employment. As a form of labor activity, it is rarely carried on without the concomitants of picketing or boycotting. Because it is an expensive weapon, the strike is generally labor's last resort in connection with industrial controversies. For the same reason, and for the additional reason that it is many times difficult to get men in sufficient numbers to strike, the practice of picketing has in the last decade become a much more widely employed form of labor activity.

The outstanding characteristics of the strike as that term is employed in modern times are four: ~~first~~, an established relationship between the strikers and the person or persons against whom the strike is called. Variants here, as elsewhere, obscure the precise definition of the strike. "If berrypickers should refuse to report for work at the beginning of the season is this to be considered a strike? They have not quit work, having never begun."¹

Second, the constituting of that relationship as one of employer and employee. Concerted refusal to deal by independent contractors or by other merchants does not come within the purview of the definition of the term "strike." In *Paramount Pictures, Inc. v. United Motion Picture Theatre Owners*,² an association of independent motion picture theatre owners sought to secure better terms of contracts with the plaintiff Paramount Pictures, Inc., for which purpose the association declared a "strike" against the plaintiff, terming the concerted refusal to deal with the plain-

1. John I. Griffin, *Strikes* (A statistical survey) p. 19. See also *Parker Painting Co. v. Brotherhood of*

Painters, 23 F(2d) 743 (CA DC 1927),
2. 93 F(2d) 714 (CCA 3, 1937).

tiff a "sit-down strike." A picketing campaign was also included. The activities were held to constitute violations of the Sherman Anti-Trust Act. Notwithstanding use of the terms "strike" and "picket," the situation was not one which involved the concerted suspension of employment by working men in connection with an industrial controversy. So also in *Ultram v. Local 362*,³ it was held that where the relationship between the parties was that of joint venture or lease on shares, picketing would not be permitted to obtain higher wages.

Third, the existence of a dispute between the parties and the utilization by labor of the weapon of concerted refusal to continue to work, as the method of persuading or coercing compliance with the workingmen's demands. Obstruction, interference and soldiering short of sabotage, however, accomplish results similar to the strike though without the phenomenon of concerted cessation of employment.

Fourth, the contention advanced by workers that although work ceases, the employment relation is deemed to continue albeit in a state of belligerent suspension. This last characteristic of the strike, which is one having important legal consequences, will be considered more fully in the following section.

Section 79. Notion of the "Striking Employee."

Labor has long advanced the contention that a strike does not terminate the employment relationship. There is a concerted suspension of employment, to be sure, but labor has insisted that the striking workers continue to retain the employee-status during the continuation of the strike. In *Iron Molders Union v. Allis Chalmers*,⁴ the court thus described with approval the sui generis nature of a striking employee or the employee whose work has ceased in consequence of a lockout: "Neither strike nor lockout completely terminates, when this is its purpose, the relationship between the parties. The employees who remain to

3. 122 NJ Eq 404, 194 A 263 (1937). See, for the legality of

picketing in non-labor disputes cases,

infra, section 134.

4. 166 F 45, 91 CCA 631, 20 LRA (NS) 315 (CCA 7, 1908).

take part in the strike or weather the lockout do so that they may be ready to go to work again on terms to which they shall agree,—the employer remaining ready to take them back on terms to which he shall agree. Manifestly then, pending a strike or a lockout, and as to those who have not finally and in good faith abandoned it, a relationship exists between employer and employee that is neither that of the general nature of employer and employee, nor again that of employer looking among strangers for employees or employees seeking from strangers employment.” Recognition of the notion of the striking employee is also contained in *Keith Theatre v. Vachon*,⁶ where the court said “while out on strike it is not considered that the strikers have abandoned their employment, but rather have only ceased from their labor.”⁶

Likewise illustrative of the distinction between a strike and the ordinary discharge or termination of employment is the case of *Uden v. Schaeffer*.⁷ There a bonding company was sued as surety for a plumbing contractor who had defaulted in performance of a contract with the plaintiff. It appeared that A. had been a member of an association, which association had agreed with a plumbers' union to employ only members of such union in its contracting work, and which union in turn had agreed not to work for any contracting plumber who was not a member of the association in good standing. In consequence of unfair bidding for work, A. was suspended from membership in the association. Thereupon A's union plumbers quit in a body. The bonding company's defense was a provision in the surety contract which exempted it from liability for any damages resulting from strikes. The court, however, found against the bonding company, upon the ground that the concerted act of quitting by the union plumbers did not constitute a strike. Said the Court: “A strike is the act of quitting work by a body of workmen for the purpose of

5. 134 Me 392, 187 A 692 (1936).

6. See also *State v. Perspennett*, 114

Kan 680, 220 P 520 (1923); *Greenfield v. Central Labor Council*, 104

Or 259, 207 P 168 (1922). 104 Or 236, 192 P 783 (1920).

7. 110 Wash 391, 188 P 395 (1920). ✓

coercing their employer to accede to some demand they have made upon him, and which he has refused; but it is not a strike for workmen to quit work either singly or in a body, when they quit without intention to return to the work, whatever may be the reason that moves them so to do."

In spite of these occasional judicial remarks recognizing the striking employee's continued status, the actual holdings of the cases were against labor's viewpoint prior to the enactment of the National Labor Relations Act. Thus, it has been held that striking employees are guilty of trespass if they continue to remain upon the employer's premises.⁸ Striking employees who asserted a right to engage in a sit-down strike have uniformly been condemned by the law.⁹ An employee whose services were interrupted by a strike is not entitled to inclusion of the striking period in connection with workmen's compensation benefits where he is reinstated by the employer upon termination of the strike.¹⁰ In *Canoe Creek Coal Co. v. Christenson*,¹¹ the mere act of striking was held to terminate the employment relationship so as to make the Clayton Anti-Injunction Act inapplicable to the controversy. In *Birmingham Trust & Sav. Company v. Atlanta, B. & A. R. Company*,¹² it was held that striking railroad employees were without standing at a hearing called under the Newlands Act in connection with the determination of wages.

The National Labor Relations Act¹³ has, however, codified favorably to labor, the notion of the "striking employee." Section 2(3) of the act provides that the term "employee" shall include any individual "whose work has ceased as a consequence of or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantial-

8. *New York, L. E. & W. R. Co. v. Wenger*, 90 Ohio Dec Rep 815 (1887).

9. See *infra*, section 106.

10. *Brown v. Central West Coal Co.* 200 Mich 174, 166 NW 850 (1918).

11. 281 F 559 (DCWD Ky 1922),

reversed on another ground sub nom. *Sandefur v. Canoe Creek Coal Co.* 293 F 379 (CCA 6, 1923), 266 US 42, 45 S Ct 18, 69 L Ed 162, 35 ALR 451 (1924).

12. 271 F 743 (DCND (Ga 1921).

13. 49 Stat 449 (1935), 29 USCA sections 151-166.

ly equivalent employment. . . .” Striking employees are entitled to reinstatement with or without back pay (depending upon the circumstances) upon termination of a strike where the strike was called in consequence of an unfair labor practice or where the employer discriminates against more active unionists in taking his men back, or where, in connection with strikes not resulting from unfair labor practice, the employer has not hired others to take the strikers’ places.¹⁴ The employer is not relieved under the Act of the duty to bargain collectively with his employees by reason of the fact that they are engaged in a strike.¹⁵ A more extended analysis of the position of the striking employee under the National Labor Relations Act will be found hereafter in this work.¹⁶

Section 80. Importance of Determining the Existence of a Strike.

The question whether a strike may or may not be said to exist, arises generally in six classes of cases. First, cases involving the permissibility of picketing in jurisdictions limiting such permissibility to activity in furtherance of a strike;¹⁷ second, cases involving the permissibility of bannering by pickets that the establishment picketed is on strike.¹⁸ Third, cases arising under statutes in effect in a number of jurisdictions, which make it penal for an employer or employment agencies to advertise for help during the existence of a strike, without stating the existence thereof.¹⁹ Fourth, cases involving contracts wherein

14. See *NLRB v. Mackay Radio & Telegraph Co.* 304 U.S. 333, 58 S. Ct. 904, 82 L. Ed. 1381 (1938).

15. *Black Diamond Steamship Co.* 3 NLRB 84 (1937), enforced in 94 F. (2d) 875 (CCA 2, 1938) cert. den. 304 U.S. 579, 58 S. Ct. 1044, 82 L. Ed. 1452 (1938).

16. See *infra*, section 277.

17. See *infra*, sections 117-121, for the legality of picketing in the absence of a strike.

18. See *infra*, section 126 for cases involving the bannering by pickets of establishments assertedly involved in a strike.

19. Statutes prohibiting advertisements or otherwise limiting offering of employment, in cases involving strikes, or strikes and lockouts, have been enacted in the following states:

California. — Stats 1937 (Deering) Labor Code, Section 973

Colorado. — Ann Stats 1935, c. 97, Section 71.

the promisor has inserted a clause relieving him from liability for non-performance in the event of a strike.²⁰ Fifth, cases involving the liability of surety companies on surety bonds guaranteeing the contractor's performance except in the event of a strike.²¹ Sixth, cases involving employees' rights to unemployment benefits under state laws denying such benefits to employees whose jobs have been terminated by strike.²²

In *Irvine v. Projectionists Union*,²³ the defendant, in an action brought to enjoin picketing because allegedly carried on in the absence of a strike, moved to punish the

Connecticut. — Gen Rev Stats 1930, Section 2348.

Illinois. — Ann Stats (Smith Hurd) Sections 182, 197g

Indiana. — Ann Stats 1933, Section 40-712

Maine. — Rev Stats 1930, c 54, Section 7.

Massachusetts. — Gen Laws 1932, c 149, Sections 22, 23, as am by Acts of 1935, c 114; c 150, Section 4.

Minnesota. — Stats 1927 (Mason) Section 4254-15(j).

Montana. — Rev Codes 1935, Section 11220.

New Hampshire. — Pub Laws 1926, c 176, Sections 36-38

Nevada. — Comp Laws (Hillyer, 1929), section 2772

Oklahoma. — Stats 1931, Section 10879 Held constitutional as against the contention that the Act constituted an interference with interstate commerce. *Ritter-Conley Mfg. Co v Wryn*, 70 Okla 247, 174 P 280 (1918).

Oregon. — Ann Code (1930), section 49-1001.

Pennsylvania. — Ann Stats (Purdon) Title 18, Sections 206, 607, 608

South Dakota. — Code 1939, Section 17.0706.

Tennessee. — Code 1932, Sections 11363, 6702.

Virginia. — Code 1936, Section 1804

Washington. — Rev Stats (Remington) Section 2624.

Wisconsin. — Stats 1937, section 103 43

Wyoming. — Stats 1931, Section 65-407

There are also statutes which prohibit the inducing of a person to move out of or into the state by misrepresenting the conditions applicable to strikes or industrial disputes See

California. — Stats 1937 (Deering) Labor Code Section 970.

Colorado. — Ann Stats 1935, c 97, Section 71.

Montana. — Rev Codes 1935, Section 11220

Oklahoma. — Stats 1931, Sections 10879, 10881

20. See *infra*, section 107, for a discussion of such cases

21. See section 107, *infra*, and section 79, *supra*.

22. See *supra*, section 44. See also Schindler, *Collective Bargaining & Unemployment Legislation* (1938), 38 Col L Rev 858; Fierst and Spector, *Unemployment Compensation in Labor Disputes* (1940), 46 Yale L Jour 461

23. 2 OCH Lab Cas 320 (Super Ct Los Angeles 1940).

plaintiff for contempt, for falsely signing an affidavit alleging that there was no strike when in fact there was a strike and the plaintiff well knew that there was a strike. It appeared that the sole employee about whom the controversy revolved, was discharged when he refused to work for less money. The court refused to enjoin the picketing, holding that there was a bona fide dispute concerning wages, but likewise held that the plaintiff would not be punished for contempt, since the statement contained in the plaintiff's affidavit to the effect that there was no strike was technically true. If, said the court, the employee whose wages were reduced had voluntarily quit, there would have been a strike in the technical sense, but since he remained until he was discharged, the opposite was true.²⁴

A problem, which usually arises in connection with the legality of picketing in the absence of a strike, or in relation to statutes forbidding advertisements for employees by employers against whom a strike has been declared without stating the existence of the strike, concerns the means of determining whether a strike has been terminated whether by abandonment or otherwise. The question is discussed hereafter in this work.²⁵

Section 81. When a Strike Exists.

The question whether a strike exists in the given case has been raised in connection, among others, with the problem whether a strike exists where a single employee quits his employment. The question has also been raised, in jurisdictions whose courts deny that a strike exists where a single employee quits his employment, as to the number of employees necessary to engage in a concerted suspension of employment for the suspension to be called a "strike." The question whether a "strike" exists when only one em-

24. Under the National Labor Relations Act, it has been held that an employee who voluntarily quits because he has been transferred or demoted because of his union activities, 242

in violation of Section 8(3) of the Act, may be considered to have been discharged. See *infra*, sections 317, 320.

25. See *infra*, section 118.

[1 Teller]

ployee quits his employment has been answered in the affirmative by the New York Courts, and negatively by the courts of Ohio and Oregon. A recent New York case held that persons picketing the place of business of an employer, only one of whose employees had struck, were not guilty of misrepresentation in announcing to the public the existence of a strike.²⁶ A strike, reasoned the court, may be constituted as well by one employee quitting his work as by a group. In the Ohio and Oregon cases,²⁷ the question involved the propriety of picketing, which, under the present Ohio and Oregon law may not be employed in the absence of a strike.²⁸ It appeared in each case that only one of the employees of the premises picketed had struck. The picketing was held enjoinable, upon the ground that a strike, said both courts, imports a general walkout.

It needs to be noted that generally the termination by a single employee of his employment presents no substantial problems relevant to the subject of labor dispute, in view of the common law rule permitting an employee to quit his employment without questioning his motive in so doing. Combination by employees, on the other hand, exercising in concert an alleged right to quit, has presented to the common law a situation affected with public interest and involving *prima facie* illegality because interfering in gross with the employer's right to a free and open market.²⁹

The cases appear generally to hold, as indicated above and more fully to be indicated below, that the quitting by one of several or many employees does not constitute a strike. There must be a general walkout. Thus, in *Gegas v. Greek Restaurant Workers Club*,³⁰ a walkout of four employees out of sixteen was held insufficient to constitute a

26. *People v. Tepel* (Magistrate's Court, New York City), 3 NYS(2d) 779 (1939). *c/f* *Edelman v. Retail Grocery Clerks U.*, 119 Misc 618, 198 NYS 17 (1922). See *People ex rel. Dillon v. Schroedeman*, 133 Misc 557, 232 NYS 302 (1929).

27. *Saltsman v. United Retail Employees*, 10 Ohio Op 6 (1937); *More-*

land Theatres v. M. P. Union, 140 Or 35, 12 P(2d) 335 (1932).

28. See *infra*, section 117.

29. See *supra*, sections 11-23, for a discussion of the nature of a right to a free and open market.

30. 99 NJ Eq 770, 134 A 309 (1924).

strike (so as to legalize picketing which in New Jersey is limited to furtherance of a lawful strike).³¹ In *Davis v. McGuigan*,³² the court said that the word "strike" conveys the impression that a substantial number of employees have ceased work. Hence pickets may be enjoined insofar as they advertise the existence of a strike where only two of many employees have struck. The cases as yet contain no clarification upon the question as to the precise number of employees who need to be involved for a general walkout so as to constitute the activity as a strike, to exist. The notion seems to be gaining ground, however, that a majority of employees, but no less, would satisfy the requirement. Thus, for example, a 1939 amendment to the Wisconsin Anti-injunction Act³³ has defined a "labor dispute" in terms requiring a majority of employees of a given unit to participate. Like statutes have been enacted in Oregon,³⁴ and in Pennsylvania.³⁵ The Restatement of Torts³⁶ takes issue with decisions which assume or imply that a majority must be involved as a condition to the existence of a strike or to the legal exercise of labor activity: ". . . in the absence of applicable legislation to the contrary, the propriety of an object of concerted action by workers does not depend upon whether the object has the support of the majority of workers affected. Concerted movements which ultimately gain the support of majorities are frequently begun by minorities."³⁷

31. See also *Moreland Theatres v. M. P. Union*, 140 Or 35, 12 P2d 335 (1932); *Saltzman v United Retail Employees*, 10 Oh Op 6 (1937).

32. 36 Pa D & C 554 (1939).

33. 1939 Wis Stats sec. 103.02 By Section 111.06 (2e) of the State Labor Relations Act, known as the "Employment Peace Act," it is declared an unfair labor practice for employees to picket or to boycott or to engage in "any other overt concomitant of a strike unless a majority in a collective bargaining unit of the employees of an employer

against whom such acts are primarily directed have voted by secret ballot to call a strike."

34. Laws of 1939, c 2

35. Purdon's Ann Stats Title 43 "Labor" and L 1939, c 57.

36. Section 783 (Introductory note).

37. Statutes restricting the meaning of the term "labor dispute" to strike cases involving a majority of employees affect the legality of picketing in the absence of a strike. See *infra*, section 117.

Section 82. Wide Variety of Purposes for Which Strikes Are Carried On.

Popular thinking identifies the purpose of the strike with problems relating to wages, hours, and immediate conditions of employment. The purposes of the strike are profoundly wider in ambit, however, finding their motives sometimes in ideas about trade and industrial unions (as for example the strike for the closed shop, or for union recognition),³⁸ at other times in social and political ideals (outstandingly the Belgian general strikes to achieve universal manhood suffrage, and the German general strike of 1923 to oppose the so-called "Kapp-Putsch" which sought to destroy the German Republican form of government). The term "Strike" has been used in non-labor disputes situations, by reason of the popular appeal of the term in some circles. A prominent illustration is the movement among militant or radical student organizations to "strike" against war. There is also a popular tendency discernible today, to utilize the term "strike" as a term definitive of any act or refusal to do something usually done or required or expected to be done. Examples of such a tendency are the terms "hunger strike" and "rent strike." Thus in the case of *Sea Gate Association v. Sea Gate Tenants Association*,³⁹ the New York Supreme Court issued an injunction restraining "striking" tenants from picketing the premises of a landlord.⁴⁰ "Parents' strikes" involving parents' refusal to send

38. Strikes for union recognition rose from less than 6% in 1881 to 46% of the total strikes in 1934. See U. S. Bureau of Labor, Twenty first Annual Report of the Commissioner of Labor, 1906, pp. 56-57. U. S. Bureau of Labor Statistics, Monthly Labor Review, July, 1934, pp. 75, 162.

39. 168 Misc.742, 6 NYS(2d) 387 (1938).

40. Affirmed by the Appellate Division, Second Department, 11 NYS(2d) 232 (1939). See *Camden Nominees, Ltd. v. Slack* (1940), 4 All Eng Rep 1, involving a rent strike called

in protest against the landlord's failure, although he had covenanted to do so, to light and clean the common staircase and to maintain constant hot water and heating. The landlord sued to enjoin members of the tenants' association from inducing the tenants to breach their contract to pay rent. The court granted an injunction, and at the same time declared its disagreement with the proposition "that inequality of wealth or position justifies a course otherwise actionable, and that tenants may adopt measures of self-help against their landlord because, in

children to school in protest against allegedly unfair or unhealthy conditions, and "strike by capital" to designate refusal by moneyed men to invest because of alleged unfriendly governmental laws, further illustrate the widespread use of the term.⁴¹ In this work, the term "strike" will be limited in scope to cases involving labor disputes. The legality of picketing in non-labor disputes cases is discussed at a later point in this work.⁴²

Section 83. Strikes Distinguished from Lockouts.

The "lockout" alike with the "strike," constitutes a suspension of employees' services, but the distinction is said to arise from the fact that the employer rather than his employees is the doer of the deed of suspension. In both cases, a labor controversy exists, which is deemed intolerable by one of the parties, but the lockout indicates that the employer rather than his employees have brought the matter to issue. Strikes are said statistically to be the rule, while lockouts constitute exceptions,⁴³ but it is probably impossible to determine with any fair degree of conclusiveness whether the given dispute has been precipitated by a strike or a lockout because one, especially the latter, is many times set in motion in hurried anticipation of the other. Thus, for example, the October 1939 Dodge Plant labor dispute was called a lockout by the employees involved, while the plant officials, with equal vehemence, insisted the dispute was precipitated by a strike.⁴⁴ The problem becomes important under Unemployment Insurance laws which deny unemployment benefits to employees who have lost employment by reason of a strike but not where the cessation of employment resulted from a lockout.⁴⁵ The

their judgment, the law does not afford them adequate remedy for his default."

41. See, in this connection, the *New York Times* (March 3rd, 1939) for a report of the punishment by the Children's Court of a parent who refused, along with others and in connection with them, to send his

child to a given school for stated reasons.

42. See *infra*, section 134.

43. *Ency of the Soc Sciences*, Title "Strikes and Lockouts."

44. *New York Times*, October 19, 1939, p. 1.

45. See *supra*, section 44.

problem also becomes important in connection with the National and prototype State Labor Relations Acts, where the problem raised is whether the controversy involves a lockout so as to entitle the employees to reinstatement because of the employer's unfair labor practice, or whether the cessation of employment was the consequence of a strike not involving any unfair labor practice on the part of the employer. The legality at common law of combinations among employers to lock out their employees is unquestioned.⁴⁶ However, under the National Labor Relations Act and State Labor Relations Acts modelled after the National Act a lockout, shut-down or removal of the plant or business are unfair labor practices.⁴⁷

Section 84. Legality of Strikes Generally Depends upon Lawfulness of Purpose.

Of the states which sanction the primary strike, fourteen appear to do so upon the theories either that workers in combination are but doing that which each worker has an absolute right to do, or that the courts will not enjoin a strike because to do so would be to enforce an involuntary servitude.⁴⁸ These are Alabama, Arizona, California, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, New Jersey, Oklahoma, Texas, Virginia, and Washington.⁴⁹

46. See *Sinsheimer v. United Garment Workers*, 77 Hun 215, 28 NYS 321 (1894), reversing 5 Misc 448, 26 NYS 152 (1894); *McCord v. Thompson-Starrett Company*, 112 NYS 902 (1908), aff'd 129 AD 130, 113 NYS 385 (1908), aff'd 198 NY 587, 92 NE 1090 (1910). See also *Iron Molders Union v. Allis Chalmers Company*, 166 F 45, 20 LRA(NS) 315, 91 CCA 631 (CCA 7, 1908).

47. See *American Radiator Co. v. NLRB* 1127 (1938), *Phillips Granite Co.* 11 NLRB 910 (1939); *NLRB v. Hopwood Retinning Co.* 98 F(2d) 97 (CCA 2 1938), enforcing 4 NLRB 922 (1937); *S. & K. Kneepants Co.* 2 NLRB 940 (1937); *Robinson & Golluber*, 2 NLRB 460 (1936); *J.*

Klotz & Co. 13 NLRB 746 (1939). See *infra*, chapter sixteen and especially sections 321, 368 for a discussion of the National Labor Relations Act and of the effect of a lockout under the act.

48. See cases cited *infra*, at section 85. Federal cases so reasoning are *Barnes v. Berry*, 156 F 72 (CCSD Ohio 1907), *Toledo R. Co. v. Pa. Co.* 54 F 730, 19 LRA 387 (CCND Ohio 1893) aff'd 166 US 548, 17 S Ct 658, 41 L Ed 1110 (1897); *Arthur v. Oakes*, 63 F 310, 25 LRA 414, 11 CCA 200 (CCA 7, 1894); *Goldfield Cons. Mines Co. v. Goldfield Miners Union*, 159 F 500 (CCD Nev 1908); *Delaware R. Co. v. Switchmen's Union*, 158 F 541 (CCWD NY 1907).

The remaining states proceed expressly upon the theory of justification. In New York, the courts have used conflicting language, but it is now safe to assume that the right to strike in that State is not absolute but relative, rather, to its purpose. Thus, although there is language in *National Protective Association v. Cumming*⁴⁹ which might be construed to accord to labor an absolute right to strike on the theory that whatever one may do alone he may likewise do in combination with others, the words of Judge Andrews in the more recent case of *Exchange Bakery v. Rifkin*⁵⁰ more reliably state the present New York rule to be that concerted action is subject to a kind of control not applicable to the action of a single individual.

A strike for both a legal and an illegal purpose is illegal in its entirety.⁵¹

The burden of proving the lawfulness of the given purpose is upon the strikers.⁵² This is simply another way of saying that an underlying theory of American Labor Law, which Mr. Justice Holmes did much to clarify and which the cases are beginning to state more and more clearly, is that labor activity, whether taking the form of a strike, picket or boycott, constitutes *prima facie* the intentional

49. 170 NY 35 63 NE 369 58 LRA 135, 85 Am St Rep 648 (1902) c/f *Interborough Rapid Transit Co. v. Lavin* 247 NY 65 159 NF 863 (1928) where the court said "Unless the workers have by agreement, freely made given up such rights, they may without breach of contract leave an employment at any time separately or in combination, and may demand new terms of employment which in turn must be fixed by bargain.

50. 245 NY 260, 157 NE 130 (1927), reargument denied 245 NY 651, 157 NE 895 (1927). See also *Albro J. Newton Co. v. Ericson*, 126 NYS 949, 951 (1911) where the court said: "A strike is a combination to quit work; and a strike can never in and of itself be illegal. It does not

need to be justified. The absolute right to quit work, which necessarily exists in a free constitutional government construed on individualistic principles, is guaranteed by our Constitution, and cannot be abridged by legislative, executive or judicial power" c/f *Opera-on Tour v. Weber*, 258 AD 516, 17 NYS(2d) 144 (1940).

51. *Folsom Engraving Co. v. McNeil*, 235 Mass 269, 126 NE 479 (1920). See also *Baush Machine Tool Co. v. Hill*, 231 Mass 30, 120 NE 188 (1928). *Accord Rest., Torts* (1939), Section 796.

52. *New Jersey Painting Co. v. Local No. 26*, 95 NJ Eq 108, 122 A 622 (1923) reversed on other grounds in 96 NJ Eq 632, 126 A 399 (1924). c/f *Maisel v. Sigman*, 123 Misc 714, 206 NYS 807 (1924)

infliction of legal harm which, to escape legal sanctions, must prove justification.⁵³ The determination of the object or purpose sought to be accomplished by the strike is one of fact,⁵⁴ while it is a question of law whether such object or purpose is legal or illegal.⁵⁵

Section 85. Strike for Higher Wages, Less Hours or Other More Beneficial Conditions of Employment.

American judicial decision is now in general agreement that labor possesses a right to participate in a primary strike, where the workers' complaints have reference to wages, hours or other conditions of immediate employment.⁵⁶ The category of wages and hours "includes also a

53. See *supra*, section 73 for a discussion of just cause and *supra*, section 74 for a discussion of the contribution of Mr. Justice Holmes to American Labor Law. Sections 27-56 state the legal sanctions referred to.

54. *W. A. Snow Iron Works v. Chadwick*, 227 Mass 382, 116 NE 801, 1 LRA1917F, 755 (1915).

55. *Cornellier v. Haverhill Shoe Mfrs. Assn.* 221 Mass 551, 109 NE 643, 1 LRA1916C, 218 (1915); *De Minico v. Craig*, 207 Mass 593, 94 NE 317, 42 LRA(NS) 1048 (1911).

56. Not all of the cases cited in support of the proposition stated involve directly the question of a primary strike for wages, hours or other conditions of employment. The rationale of the cases, however, justifies their inclusion in support of the proposition stated. It should also be added that in some cases the decision went against the workers because of alleged evidence of violence, whether in the course of the strike, picket or boycott.

United States. — See *American Steel Foundries v. Tri-City Central Trades Council*, 257 US 184, 42 S Ct 72, 66 L Ed 189, 27 ALR 360 (1921); *Hopkins v. Oxley Stave Co.* 83 F 912,

28 CCA 89, 49 US App 709 (CCA 8, 1897); *Great Northern Ry. Co. v. Local Great Falls Lodge* 283 F 557 (DCD Mont 1922); *Great Northern Ry. Co. v. Brosseau*, 286 F 414 (DC D N Dak 1923).

Alabama. — *Hardie Tynes Mfg. Co. v. Cruise*, 189 Ala 66, 66 S 657 (1914).

Arizona. — *Truax v. Bisbee*, 19 Ariz 379, 171 P 121 (1918).

Arkansas. — *Local No. 313 v. Stathakis*, 135 Ark 86, 205 SW 450 (1918).

California. — *Parkinson v. Bldg. Trades Council*, 154 Cal 581, 98 P 1027 (1908); *Pierce v. Stablemen's Union*, 156 Cal 70, 103 P 324 (1909).

Colorado. — *Hirano v. Journeyman Cooks Union*, 1 Colo Dec Supp 160.

Connecticut. — *State v. Stockford*, 77 Conn 227, 58 A 769 (1904).

Delaware. — *Sarros v. Nourris*, 15 Del Ch 391, 138 A 607 (1927).

Florida. — *Jetton Dekle Lumber Co. v. Mather*, 53 Fla 909, 43 S 590 (1907).

Georgia. — *Jones v. Van Winkle Gin & Mach. Works*, 131 Ga 336, 62 SE 236 (1908).

Idaho. — *Robison v. Hotel & Rest. Emp. Local*, 35 Ida 418, 207 P 132 (1922).

variety of matters related to wages and hours, such as, the times at which wages are payable, medium in which they

Illinois. — *Illinois Malleable Iron Co. v. Michalek*, 279 Ill 221, 116 NE 714; *Beaton v. Tarrant*, 102 Ill App 124 (1902); *Rosen v. United Shoe Workers*, 287 Ill App 49, 4 NE(2d) 507 (1936); *Kemp v. Division No. 541*, 255 Ill 213, 99 NE 389, Ann Cas 1913D 347 (1912).

Indiana. — *Karges Furniture Co. v. Amal. Woodworkers Local U.*, 165 Ind 421, 75 NE 877 (1905).

Iowa. — *State v. Rohlf*, 140 Iowa 182 (1908).

Kansas. — *Kansas v. Howat*, 116 Kan 412 (1924). Strikes are illegal in industries "affected with a public interest" as defined by statute (1935 Stats Secs 44-601-607; 44-617). Lockouts are likewise forbidden in such industries.

Kentucky. — *Saulsberry v. Cooper Intl Union*, 147 Ky 170, 143 SW 1018 (1912).

Louisiana. — See *Dehan v. Hotel Employees*, 159 S 637 (La 1935).

Maine. — *Keith Theatre v. Vachon*, 134 Me 52, 187 A 692 (1936).

Maryland. — *Bricklayers Union v. Ruff*, 160 Md 483 (1931).

Massachusetts. — *Cornellier v. Haverhill Shoe Mfrs Asso* 221 Mass 554, 109 NE 643, LRA1916C, 218 (1915); *Minasian v. Osborne*, 210 Mass 250 (1911); *M. Steinert & Sons Co v. Tagen*, 207 Mass 394, 93 NE 684, 32 LRA(NS) 1013 (1907).

Michigan. — *Beck v. Rwy Teamsters Pro Union*, 110 Mich 407, 77 N W 13 (1899).

Minnesota. — *Bohn Mfg. Co. v. Hollis*, 54 Minn 223, 55 NW 1119 (1893); *Gray v. Bldg. Trades Council*, 91 Minn 171, 97 NW 663 (1903).

Missouri. — *Lohse Patent Door v. Smith*, 215 Mo 421, 114 SW 997, 22 MoA(NS) 607, 128 Am St Rep 492 (1908); *Carter v. Oster*, 134 Mo App 550

146, 112 SW 995 (1908).

Montana. — *Lindsay & Co. v. Montana Fed. of Labor*, 37 Mont 264, 96 P 127 (1908).

Nebraska. — *State v. Employers of Labor*, 102 Neb 708, 169 NW 717, 170 NW 185 (1918).

Nevada. — *Branson v. Ind. Workers of the World*, 30 Nev 270, 95 P 354 (1908).

New Jersey. — *Connett v. United Hatters of No America*, 74 A 188 (1909); *Brenner v. United Hatters of No America*, 73 N.JL 729, 65 A 165 (1909); *Booth v. Burgess*, 72 NJ Eq 181, 65 A 226 (1906); *New Jersey Painting Co. v. Local 26*, 95 NJ Eq 108, 122 A 622 (1923), reversed on other grounds, 96 NJ Eq 632, 126 A 399, 47 ALR 384 (1921).

New Mexico. — An Anti-Injunction Act was passed in 1939, effective June 8th, Ch 193, sec 1, L 1939. Labor organizations are also excepted by statute from the state Anti Trust Act. (See 35-2904, Stats 1929).

New York. — *Exchange Bakery v. Rifkin*, 245 NY 260, 157 NE 130 (1927), rehearing denied 245 NY 651, 157 NE 845 (1927).

North Carolina. — *Citizens v. Asheville Typ. Union*, 187 NC 587, 121 SE 31 (1924).

North Dakota. — Employee combination to raise or maintain wages is declared by statute not to constitute a punishable conspiracy (Sec. 9443, Comp. Laws 1913). There is also a State Anti-Injunction Act (Ch. 247, Sec. 6, Laws of 1935).

Ohio. — *State v. Bateman*, 10 Ohio B. & C. 68, 7 Ohio NP 487 (1900).

Oklahoma. — *Roddy v. United Mine Workers of America*, 41 Okla 62, 139 P 126 (1914).

Oregon. — Employee combination to

are paid, cash, script, services or commodities, etc., time of the day in which the hours of work fall, the basis upon which wages are computed, that is hours, weeks or units of production, and so forth." ⁵⁷ Thus it has been held that a strike to enforce the payment of wages during hours of employment is legal, the court reasoning that the demand involved in the strike was one for less hours of employment. ⁵⁸ So, also, a strike has been held legal in protest against the increase of the amount of work. ⁵⁹

The term "conditions of labor" likewise involves a wide variety of circumstances. Thus, it has been held that a

raise or maintain wages is declared by statute not to constitute a punishable conspiracy (Title 49, Sec. 49-905, Code of 1930), and it is also provided by statute that combinations of workers to lessen hours, increase wages or better working conditions shall not be illegal unless the acts done by the combination would be illegal if done by a single individual (Title 49, Sec. 49-905, Code of 1930). There is also a State Anti-Injunction Act (Title 49, Sec. 49-902-4-6-13, Code of 1930).

Pennsylvania. — *Commonwealth v. Sheriff*, 16 Phila 393, 38 Leg Int 412 (1881); *Erdman v. Mitchell*, 207 Pa St 79, 58 A 327 (1901); *Cook v. Dolan*, 19 Pa Co Ct 401 (1897). *Jefferson & I. Coal Co. v. Marks*, 207 Pa 171, 134 A 430, 47 ALR 745 (1926).

Rhode Island. — *Rhodes Brothers Co. v. Musicians Pro. Union*, 37 RI 281, 92 A 641, 18 LRA(NS) 207, 127 Am St Rep 722 (1915).

South Carolina. — A statute (Sec 1289, Code of 1932) provides that discrimination against any employee because of labor union membership shall be a misdemeanor.

Tennessee. — *Powers v. Journeyman Bricklayers Union*, 130 Tenn 743 (1914).

Texas. — *Webb v. Cooks, Waiters &*

Waitresses Union, 205 SW 465 (Tex Civ App 1918); *Sheehan v. Levy*, 215 SW 229 (Tex Civ App 1919).

Utah. — A provision in the State Labor Relations Act declares that nothing in the Act shall be held to interfere with the right to strike (Sec. 49-1-14 Supplementary laws of 1939).

Virginia. — *Everett Wadday Co. v. Richmond Typo Union*, 105 Va 188, 53 SW 273 (1906).

Washington. — *Jensen v. Cooks and Waiters Union*, 39 Wash 531, 81 P 1069 (1905).

Wisconsin. — *Adler & Sons Co v Maglio*, 200 Wis 153, 227 NW 243 66 ALR 1085 (1929).

Wyoming. — An Anti-Injunction Act was passed in 1933 and amended in 1937 (L. 1933, c 37, Sec. 3, as amended L. 1937 c. 15), which lists a strike as one of the labor activities insulated from injunction except in accordance with the terms and provisions of the Act.

⁵⁷ Rest., Torts (1939), sec. 784 (b)

⁵⁸ L. D. Willcutt & Sons Company v. Driscoll, 290 Mass 116, 85 NE 897, 23 LRA(NS) 1236 (1906).

⁵⁹ Searle Mfg. Co. v. Terry, 86 Misc 265, 106 NYS 438 (1905).

strike designed to compel limitations upon the numbers of apprentices is legal,⁶⁰ and that a strike is also legal which has as its purpose compelling an employer to abandon a piece-work system of operation which permitted employees to employ their own helpers with the result that other employees were deprived of work.⁶¹ Striking has been held legal to compel the apportionment of work during slack seasons,⁶² or to compel an employer to give to the employees work which he would otherwise have given to third parties⁶³ unless, in jurisdictions which deny the legality of a strike to compel collective bargaining or to compel unionization, the strike is to compel the employment only of union men in connection with the entire project,⁶⁴ or unless the strike is connected with a jurisdictional dispute.⁶⁵ A strike is illegal which seeks to compel an employer to change his method of operation from piece work to week work.⁶⁶

The two states which have thus far indicated an attitude of general aversion for the strike are New Hampshire and Vermont. New Hampshire's main case is *White Mountain Freezer Co. v. Murphy*.⁶⁷ There the question was certified

⁶⁰ *Longshore Printing Co. v. Howell*, 26 Or 527, 38 P 547, 29 LRA 464 46 Am St Rep 640 (1904)

⁶¹ *Minasian v. Osborne*, 210 Mass 250, 96 NE 1036, 37 LRA(NS) 179, Ann Cas 1912C 1299 (1911). But see *W. P. Davis Machine Co. v. Robinson*, 41 Misc 329, 84 NYS 837 (1903)

⁶² *Benito Rovira Company v. Yampolsky*, 187 NYS 894 (1921); *Jaekel v. Kaufman*, 187 NYS 889 (1920)

⁶³ *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 F 259, 26 LRA(NS) 148, 94 CCA 535 (CCA 2, 1909); *Pickett v. Walsh*, 192 Mass 583, 6 LRA(NS) 1067, 116 Am St Rep 272, 78 NE 753, 7 Ann Cas 638 (1906); *Burnham v. Dowd*, 217 Mass 351, 51 LRA(NS) 778, 104 NE 841 (1914); *New England Cement Gun* 252

Co. v. McGivern, 218 Mass 198, LRA 1916C, 946, 105 NE 885 (1914), *Fairbanks v. McDonald*, 219 Mass 291 106 NE 1000 (1914)

⁶⁴ *W. A. Snow Iron Works v. Chadwick*, 227 Mass 382, 116 NE 801, LRA1917F, 755 (1917).

⁶⁵ See *infra*, section 88, for the legality of striking in connection with jurisdictional disputes, and sections 130 133, *infra*, for the legality of picketing under similar circumstances

⁶⁶ *Davis Machine Company v. Robinson*, 41 Misc 329, 84 NYS 837 (1903). A strike has also been held illegal which sought to compel an employer to sell his merchandise at prices fixed by the union. *Standard Engraving Co. v. Volz*, 200 AD 758, 193 NYS 83 (1922).

⁶⁷ 78 NH 398, 101 A 357 (1917)

to the appellate court whether a strike to compel a closed shop was legal. The court said it was *prima facie* illegal, and that the burden was upon the union to prove justification. The union alleged justification in the analogy of competition,⁶⁸ to which the court replied, "but there is no evidence of competition to sustain the claim." *Grimes v. Durnin*,⁶⁹ a later New Hampshire case, contains statements which would indicate that a primary strike might be held valid, but the inclusive vigor with which the Supreme Court of New Hampshire, in a recent advisory opinion,⁷⁰ declared an Anti-Injunction Statute patterned upon the Norris Act unconstitutional, justifies but little hope of judicial favor with respect to labor activity.⁷¹

Vermont's cases are *State v. Dyer*⁷² and *State v. Stewart*,⁷³ where strikes to unionize were held bad, (and in the latter case the legality of picketing was disparaged upon the broad ground that boycotting "is not the remedy to adjust the differences between capital and labor"), and *State v. Christie*,⁷⁴ where strikers were convicted under a statute which proscribed disturbance of the peace, for calling non-union workers "scabs," "rats" and "bozos." Vermont was one of the first states to outlaw the sit-down strike by penal enactment.⁷⁵ A statute also provides, however, for the voluntary arbitration with the aid of state machinery, of labor disputes wherein "a strike or lockout is seriously threatened or actually occurs."⁷⁶

The reasonableness of the demand, so long as it is in

68. For a discussion of Holmes's theory of justification, see section 74, *supra*.

69. 80 NH 145, 114 A 273 (1921).

70. In re Opinion of the Justices, 166 A 640 (NH 1933).

71. It is to be noted, however, that New Hampshire has a statute which provides that any employer who publicly advertises for employees or solicits them to work during a strike, lockout or other labor trouble must

plainly state that such conditions exist in his establishment. Public laws, 1926, ch 176, secs. 36-38. Machinery is also provided for the arbitration of labor disputes. *Ibid*, ch. 174, secs. 15, 26.

72. 67 Vt 690, 32 A 841 (1894)

73. 59 Vt 278, 9 A 559 (1887)

74. 97 Vt 461, 123 A 849 (1924)

75. L. 1937, Pub. Acts, 210.

76. Public Acts, 1939, No. 186, secs. 1-10.

connection with wages, hours or other conditions of employment, does not affect the legality of the strike.⁷⁷

Section 86. Strikes in Breach of, or Which Induce the Breach of Contract.

The legality of strikes in connection with rights secured by contract has been tested in four main situations: (1) where the strike is in breach of term contracts of employment entered into by individual workingmen engaged in the strike; (2) where it is in disregard of provisions contained in at-will employment contracts; (3) where it is in breach of collective bargaining agreements; (4) where it results in the breach of contract entered into between the employer and a third party.

Strikes which occasion the violation of term contracts to work, entered into by individual workers with their employers (i. e., where the strikers are individually under term contract of employment with their employers without the intercession of any union, whether as the employees' agent or otherwise), have been held illegal wherever the question has arisen.⁷⁸ It has been suggested that breach of an agreement by the employer will justify or at least excuse a

77. *New Jersey Painting Co. v. Local No. 26*, 95 NJ Eq 108, 122 A 622 (1923), reversed on other grounds, 96 NJ Eq 632, 126 A 399, 47 ALR 384 (1924). But see *Old Dominion S. S. Co. v. McKenna*, 30 F 48 (CC SD NY 1897), *Sayre v. Louisville Union Benevolent Ass'n*, 1 Duv (Ky) 146, 85 Am Dec 613 (1863).

78. *Wabash R. Co. v. Hannahan*, 121 F 563 (CC ED Mo 1903); *Barton & Fales Co. v. Willard*, 242 Mass 566, 136 NE 629 (1922); *Reynolds v. Davis*, 198 Mass 294, 84 NE 457, 17 LRA(NS) 162 (1908); *Mapatrick v. Range*, 9 Neb 390, 2 NW 739 (1879); *Best Service Wet Wash Laundry Co. v. Dickson*, 121 Misc 416, 201 NYS 278 (1923); *Vail Ballou Dress Inc. v. Carey*, 125 Misc 689, 212 NYS 113 (1924).

(1925). See also *Cook v. Wilson*, 108 Misc 438, 178 NYS 463 (1919). *Contra: Rest., Torts* (1939), section 795.

Picketing in the absence of a strike by a labor union, where the employer has to the knowledge of the union entered into individual contracts with his employees, has been held enjoined. *United Tailors Company v. Joint Board of Amalgamated Workers of America*, 26 Ohio NP(NS) 439 (1926).

In the *Gas-Stoker's* strike case (*Regina v. Bunn*, 12 Cox CC 316, 1872) the strikers were found guilty of criminal conspiracy because they struck collectively in breach of individual employment contracts which required notice of quitting.

strike by his employees,⁷⁹ but there is a holding that a strike designed primarily to punish the employer for his breach of an employment agreement is illegal.⁸⁰ Illustrative of cases involving individual term contracts is the case of *Best Service Wet Wash Company v. Dickson*,⁸¹ where the employees individually were bound by term contracts of employment with the plaintiff employer. The defendants, president and members respectively of a labor union of which the employees so bound by term contracts were also members, ordered them to strike, though defendants had knowledge of the fact that they were individually under term contracts with their employer. The court issued an injunction against the defendants, restraining them from "conspiring to direct plaintiff's employees to repudiate their written contract with the plaintiff." It has been held that a strike called to compel an employer to abandon a system of entering into individual contracts with his employees is for an unlawful purpose.⁸²

The individual contracts referred to must be distinguished from yellow-dog contract situations on the one hand, and collective bargaining agreements upon the other. It will readily be seen that the "individual contracts" herein involved are in no sense yellow-dog contracts, and should be sharply distinguished therefrom. The yellow-dog contract generally includes a promise by the worker not to join a labor union, or in the alternative, to quit his employment upon so doing. Moreover, the yellow-dog contract is usually an at-will arrangement.⁸³ The "individual

79. *Greenfield v. Central Labor Council*, 104 Or 236, 192 P 783, 207 P 108 (1920).

80. *Graess Contracting Co. v. Bennett*, 174 AD 744, 160 NYS 269 (1916).

81. 121 Misc 418, 201 NYS 173 (1923).

82. *Moore Drop Forging Company v. McCarthy*, 243 Mass 554, 137 NE 910 (1923).

83. See *Starr v. Laundry & Dry Cleaning Workers*, 63 P(2d) 1104

(Or 1936), holding a strike in violation of a yellow dog contract unenjoinable. *Contra*, but now had law for most purposes because of the Norris Act. *Hitchman Coal & Coke Co. v. Mitchell*, 245 US 229, 38 S Ct 65, 62 L Ed 260, LRA1918C, 497, Ann Cas 1918B, 461 (1917), where, however, the court indicated the possibility that a strike though violative of a yellow-dog contract might be legal ("The right of the latter to strike would not give to defendants

contracts" involved in the cases of which *Best Service Wet Wash Company v. Dickson* (supra) is illustrative, on the other hand, invariably have reference to term agreements, nor do they generally contain any yellow-dog provisions.⁸⁴ Statutory enactments such as the Norris Anti-Injunction Act and prototype State legislation which forbid equity aid to the yellow-dog contract might consequently, but for the fact that the employment bargain reflects unequal bargaining power, be construed to be inapplicable to individual term contracts.

The distinction between individual term contracts and collective bargaining agreements is obvious. The former binds the employer with his employees individually, while the latter comprehends a contract between one or more employers on the one side and a group of employees collectively on the other. A strike in violation of a collective bargaining contract is generally held unlawful.⁸⁵ Here as in

the right to instigate a strike. The difference is fundamental"); *International Org. UMW v. Red Jacket Consolidated Coal & Coke Co.* 18 F(2d) 839 (CCA 4, 1927), cert. den. 275 US 536 48 S Ct 31, 72 L Ed 413 (1928). In *Floersheimer v. Schlesinger*, 115 Misc 9, 187 NYS 891 (1921) and *McMichael v. Atlanta Envelope Co.* 151 Ga 776, 108 SE 226, 26 ALR 149 (1921) a strike by a labor union to compel a manufacturer to eliminate yellow dog provisions from his agreement with his employees was held illegal. *Contra. La France Electrical Construction Co. v. International Brotherhood*, 108 Ohio St 61, 140 NE 899 (1923).

84. *Vail Ballou Dress Inc. v. Casey*, 125 Misc 689, 212 NYS 113 (1925) illustrates a contract containing yellow-dog provisions coupled with a term agreement. The contract of employment in this case bound the parties to a two-year term of employment while the employee undertook not to join a labor union during

that period.

85. *Barnes v. Berry*, 156 F 72 (CC SD Ohio, 1907); *Gilchrist v. Metal Polishers*, 113 A 320 (N.J. Eq. 1919). *Burgess v. Ga. R. R. Co.* 148 Ga 415, 96 SE 864 (1918); *Preble v. Architectural Iron Workers Union*, 260 Ill App 435 (1931); *Meltzer v. Kaminer*, 131 Misc 813, 227 NYS 459 (1927); *Moran v. Lasette*, 221 AD 118, 222 NYS 283 (1927); *McGrath v. Norman*, 221 AD 804, 223 NYS 288 (1927). *McCarthy v. Brotherhood of Painters*, 102 NYLJ 393 (NY Co Sup Ct August 17, 1939); *J. I. Hass Co. v. McNamara*, 103 NYLJ 2654 (1940). Striking or picketing in breach of agreement has been held to constitute a "labor dispute" under the Norris Act, so as to be unenjoinable in the federal courts, except in accordance with the Act. *Wilson & Co. v. Birl*, 27 F Supp 915 (DCD Pa 1939), aff'd 105 F(2d) 948 (CCA 3, 1939); *c/f Lundoft-Bicknell Co. v. Smith*, 24 Ohio App 294, 186 NE 243 (1927). See also *Rhodes Bros. Co.*

general, injunctive relief for the allegedly wrongful strike is obtained by restraining the officers of the union or labor organization, upon the theory that directly to restrain a strike by enjoining the strikers is to enforce servitude. As explained in *Barnes v. Berry*,⁸⁸ "So far as the men are concerned, if they take it into their own hands they may walk out, but this court is asked to stay the hands of the officers who manage and control this organization who have power to influence, to incite, to put on foot these strikes, who have all the machinery in their hands, and who seek to use it to induce and incite these men to violate a contract that was fairly made." The Restatement of Torts (Sec. 795) recognizes the illegality of a strike or other labor activity called or embarked upon in breach of a collective contract. It is noted, however, that "not all arrangements made by an employer and his employees as the result of collective bargaining are contracts even when they are colloquially called that. Some so-called collective labor contracts create no contractual duties but are merely statements of the conditions under which an employer intends to employ workers. The rule stated in this section is applicable only when the workers are bound by a contract, under the rule stated in the Restatement of Contracts, not to demand the act which they make the object of their action." To the extent that a legally enforceable contract is required as a condition to operation of the rule holding illegal all labor activity which is in breach of contract, the Restatement is on firm ground. The distinction which is drawn between those collective bargaining agreements which are contracts, and those which merely constitute "statement of the conditions under which an employer intends to employ workers" would seem, however, to be a questionable one. The law, as will here-

v. Musicians Protective Union, 37 RI 281, 92 A 641 (1915) holding a strike to enforce a legal collective bargaining contract legal. *C/I Euclid Candy Co. v. Summa*, 174 Misc 19, 19 NYS (2d) 382 (1940); *South Wales Miners' Federation v. Glamorgan Coal Co.*

[1905] AC 239. See *infra*, section 177, for a more extended statement of the connection between "labor disputes" under anti-injunction acts, and labor activity in breach of contract.

88. 158 F 72 (CC SD Ohio 1907).

after be seen," is definitely tending to recognition of the legal status of collective bargaining agreements. Consideration to support such agreements are found in a variety of circumstances."⁸⁷

In a number of cases, strikes have been held illegal because they result in a breach of contract entered into by the employer struck against with a third party.⁸⁸ A dissenting opinion in the case of *R an W Hat Shop, Inc. v. Scully*,⁸⁹ where the court's holding was against the union because its threat to strike was an inducement to the breach of contract, deserves to be quoted in part, because it states with cogency labor's quarrel with the rule announced by these cases: "A stranger to a contract may not, for his own benefit and without legal justification, knowingly induce a breach of it, but he is not bound to assist in its performance. And so the union-makers employed in McLachlan's shop were not bound in the absence of such an agreement on their part, to continue to make hats in order that the plaintiff might remain undisturbed in the enjoyment of its contract with their employer. Although they knew of the contract, they might strike for any purpose for which they might lawfully strike in the absence of such a contract. Otherwise, employers of labor could extinguish the possibility of lawful strikes by posting notices of their outstanding contract obligations."

87. See *infra*, sections 160-163.

88. See *infra*, section 160

89. *Central Metal Products Corp. v. O'Brien*, 278 F 827 (DC ND Ohio, 1922); *O'Brien v. Fackenthal*, 5 F (2d) 389 (CCA 6, 1925); *McFarland Co. v. O'Brien*, 6 F(2d) 1016 (DC ND Ohio 1925); *Metal Door & Trim Co. v. Local No 5, 12 Law & Labor* 183 (S Ct DC 1930); *R an W Hat Shop, Inc. v Scully*, 98 Conn 1, 118 A 55 (1922). See also *Carroll v. Chesapeake & O. Coal Agency Co.* 250

124 F 305 (CCA 4th, 1903); *Dall-Overland Co. v. Willys-Overland Co.* 246 F 851 (DC ND Ohio 1920); *Niles-Bement-Pond Co. v. Iron Molders' Union*, 246 F 851 (DC SD Ohio 1917), rev'd on other grounds, 258 F 408 (CCA 6, 1918); *Vonnegut Machinery Co. v. Toledo Machine & Tool Co.* 263 F 192 (DC ND Ohio 1920); *Moore v. Whitty*, 299 Pa 58, 149 A 93 (1930).

90. 98 Conn 1, 118 A 55 (1922).

[1 Teller]

Section 87. Strikes to Compel Observance of Collective Bargaining Agreements.

The strike has been labor's traditional weapon employed to compel observance by employers of collective bargaining agreement. Employers, on the other hand, have resorted to lockouts or, much more often, to the remedy of injunction in cases involving a labor union's breach of a collective bargaining agreement. Labor preferred in former days to rely on its economic strength as evidenced by the strike weapon, rather than to petition courts of equity for injunctions against the employer's breach of agreement. In more recent times, however, labor's resort to the injunction has become more frequent, and in a number of cases labor unions have acted as parties plaintiff in injunction proceedings brought to compel observance by employers of the provisions contained in collective bargaining agreements.⁹¹ Nevertheless, the summary weapon of a strike to compel such observance will always remain a factor to be considered in connection with the breach by employers of the terms contained in collective bargaining agreements.

The law has generally held legal a strike to compel observance of a valid collective bargaining agreement by an employer.⁹² In the case of strikes to compel observance by employers of closed shop contracts, the legality of the strike would depend upon the legality of the agreement.⁹³ Thus it has been held that a strike to compel observance of an illegal closed shop contract is itself illegal.⁹⁴

Sometimes, the legality of a strike called to compel an employer to live up to the terms of a collective bargaining

91. See *supra*, section 31, and *infra*, section 163.

92. *Smith v. Bowen*, 232 Mass 106, 121 NE 814 (1919); *Abeles v. Friedman*, 171 Misc 1042, 14 NYS(2d) 252 (1939); *Local Branch v. Solt*, 8 Ohio App 437 (1918); *Rhodes Brothers Company v. Musicians Protective Union*, 37 RI 281, 92 A 641 (1915). See also, holding a boycott carried on for the same purpose legal, *Greenfeld v. Central Labor Council*, 104 Or

236, 192 P 783, 207 P 168 (1920). But see *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass 537, 130 NE 86 (1921); *Samuel Hertz Corporation v. Gibbs*, 295 Mass 229, 3 NE (2d) 831 (1936).

93. See, for the legality of closed shop agreements, *infra*, section 170.

94. *Lehigh Structural Steel Company v. Atlantic Smelting & Ref. Works*, 92 NJ Eq 131, 111 A 376 (1920).

agreement is placed not upon the strikers' right to resort to the summary remedy of a strike, but upon the employer's unclean hands as a bar to injunctive relief against the strike. Thus in *Spivak v. Wankofsky*,⁹⁶ it was held that an employer who has himself breached a collective bargaining agreement may not enjoin striking or picketing by the aggrieved union to compel the employer to live up to the terms of the agreement. Legality of a strike to compel employer observance of the terms of a collective bargaining agreement has also been rested upon the fact that the strike, being legal in the absence of evidence of wrongful purpose or the use of unlawful means, cannot be assailed where the strikers have not been guilty of any wrong in calling the strike.⁹⁷

The Restatement of Torts⁹⁸ upholds the legality of labor activity designed to compel an employer to live up to the terms of a collective bargaining agreement "whether or not another remedy is available" to compel the employer's observance. It is added, however, that "The law as to the enforcement of collective labor agreements by judicial action is not yet fully developed. Until that law is fully developed, self-help by concerted action may sometimes be the only remedy for breach of such an agreement." There is thus an implication that development of the law governing collective bargaining agreements⁹⁹ will likewise mean curtailment of the right to strike to enforce the terms thereof.

Section 88. Strikes in Cases Involving Jurisdictional Disputes.

Labor activity in connection with jurisdictional disputes has most outstandingly taken the form of picketing, and it is in this connection that the subject will hereafter be discussed at length.¹⁰⁰ In a number of cases, however, strikes

⁹⁶ 155 Misc 530, 278 NYS 502 (1935).

⁹⁷ See *Wasserstein v. Beim*, 163 Misc 160, 294 NYS 439 (1937).

⁹⁸ Rest., Torts (1939), section 730.
⁹⁹ See

⁹⁸ See, for the law governing collective bargaining agreements, *infra*, chapter ten.

⁹⁹ See *infra*, sections 132, 133 and 211.

have been called in jurisdictional controversies. Such strikes have generally been held illegal.¹ The grounds of illegality have been, first, that they are not disputes between an employer and his employees and hence, presumably, not entitled to the privileges accorded to labor unions, and second, that they induce the breach of a contract between the employer and a third party. In *Chicago Federation of Musicians v. American Musicians Union*,² it was held that a jurisdictional strike could not be carried on by means of a fine levied by the union upon members working with non-members. Striking in connection with a jurisdictional dispute, and picketing and boycotting in furtherance of such striking, have, however, been held legitimate forms of labor activity immune from prosecution under the Sherman Act.³

The Restatement of Torts (Sec. 784d) appears to have taken the position that labor activity carried on in connection with some jurisdictional disputes should be no more illegal than like labor activity designed to achieve better wages, less hours or other more beneficial conditions of employment. "A variety of terms under the rule stated in this section," says the Restatement, "relate to the security of the employees' jobs, and the provision of work for them . . . jurisdictional disputes as to whether particular work shall be done by one craft rather than another are also in this category."

1. See *Central Metal Products Corp. v. O'Brien*, 278 F 827 (DC ND Ohio 1922); *O'Brien v. Fackenthal*, 5 F(2d) 389 (CCA 6, 1925); *Metal Door & Trim Co. v. Local No. 5* 12 Law & Labor 183 (S Ct DC 1930); *Local No. 165 v. Fackenthal*, 11 Law & Labor 244 (CCA 6, 1929) (damages recovered); *Dahlstrom Metallic Door Co. v. Local No. 5*, 11 Law & Labor 79, 87 (S Ct DC 1929); *Metal Door & Trim Co. v. Booth*, 11 Law & Labor 26 (DC SD Ind 1928); *Selden Brick*

Co. v. Blair, 7 Law & Labor 255 (US DC 1925); *Selden Brick Co. v. Local Union*, 7 Law & Labor, 302 (US DC Mo 1925); *Armstrong Cork & Insulation Co. v. Walsh*, 276 Mass 263, 177 NE 2 (1931); *Herzog v. Cline*, 131 Misc 816, 227 NYS 462 (1927). c/f Rest., Torts (1939), sec 784 (d).

2. 139 Ill App 65 (1908).

3. *United States v. Hutcheson*, 32 F Supp 600 (DCED Mo 1940). But see *infra*, section 422.

Section 89. Strikes Called to Protest Discharge of, Or Discrimination against Employees, or to Secure Employment of Additional Employees; Labor Saving Devices.

Strikes in protest against the discharge of a fellow-employee or fellow-employees have been called where a single employee has or several employees have been discharged (whether for the employer's personal reasons or because of the employees' too active union agitation, or in consequence of economic conditions) or where a group of workers have been laid off in consequence of a change in the employer's economic policy (as where he determines to utilize labor saving machinery). The strike under the former circumstances has been held both proper and improper in New York,⁴ and improper in Massachusetts.⁵ The strike under the latter circumstances has been held valid in New Jersey,⁶ and invalid in New York.⁷ A variant of the latter type of strike is that to compel the employer to employ a fixed number of members of the striking labor union, as a condition to securing the employment of any of them. Such a strike has been held legal in Minnesota,⁸ New Jersey,⁹ Montana¹⁰ and Oregon,¹¹ while in Massachu-

4. *Proper*: Wood Mowing & Mach. Co. v. Toohey, 114 Misc 185, 186 NYS 95 (1921); *Improper*: Edelman v. Retail Grocery Clerks Union, 119 Misc 618, 198 NYS 17 (1922).

5. *Mechanics Foundry v. Lynch*, 236 Mass 504, 128 NE 877 (1920).

6. *Bayer v. Brotherhood of Painters*, 108 NJ Eq 257, 154 A 739 (1930); *C. B. Rutan Co. v. Local Union*, 97 NJ Eq 77, 128 A 622 (1925).

7. *Benito Rovira Co. v. Yampolsky*, 187 NYS 894 (1921). Picketing to coerce the same result was enjoined in Pennsylvania (*Joergen v. Pittsburgh Musical Society, Com. Pls. Allegheny Co.* [3/3/30]), but held legal in New York. *Opera-On-Tour v. Weber*, 258 AD 516, 17 NYS(2d) 144 (1940).

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8. *Scott Stafford Co. v. Minneapolis Musicians*, 118 Minn 410, 136 NW 1092 (1912).

9. *Bayer v. Brotherhood of Painters*, 108 NJ Eq 257, 154 A 739 (1930).

10. *Empire Theatre Co. v. Cloke*, 53 Mont 183, 163 P 107, LRA1917E, 383 (1917).

11. *Longshore Printing Co. v. Howell*, 26 Or 527, 36 P 547 (1894). In *Des Moines City Rwy. Co. v. Amalgamated Ass'n*, 204 Ia 1195, 213 NW 264 (1917), the plaintiff brought suit to nullify a contract with a labor union under the terms of which the plaintiff undertook to employ both a motorman and a conductor (members of the defendant union) upon its cars, on the grounds that it could operate its cars with only a motor-

setts it has been declared contrary to law.¹²

Strikes or other labor activity carried on to protest anti-union discrimination on the part of an employer have, as above seen, received scant favor in the cases, probably because the common law recognizes no right on the part of labor unions and organizing employees to be free from interference, restraint or coercion by employers. However, the National Labor Relations Act,¹³ in modifying the common law rule to the extent of declaring it to be an unfair labor practice under the Act for an employer to interfere, restrain or coerce employees in connection with their right to organize for the purpose of collective bargaining, or to discriminate against employees for union activity, may very well be considered in subsequent cases to indicate the desirability of holding legal, strikes or other labor activities carried on to protest against employer-interference with union activities. The Restatement of Torts has taken the position (Sec. 786) that "An employer's non-discrimination against workers because of their affiliation with a labor union, or his non-interference otherwise in their choice of such affiliation, is a proper object of concerted action by his employees," and that (Sec. 787) "Re-employment by the employer of former employees believed by the actors to have been discharged or laid off because of their affiliation with a labor union, or reinstatement of employees believed by the actors to have been locked out by him, is a proper object of concerted action by his employees."

The law governing strikes, pickets or boycotts called to

man and that, plaintiff being a public utility, the contract was against the public interest. The suit was dismissed.

12. *Hopkins v. Oxley Stave Co.* 83 F 212, 28 CCA 99 (CCA 8, 1897); *Haverhill Strand v. Gillen*, 229 Mass 413, 118 NE 671, LRA1918C, 813, Ann Cas 1918D, 650 (1918); *Folsam Engraving Co. v. McNeill*, 235 Mass 269, 126 NE 479 (1920). But see *Minasian v. Osborne*, 210 Mass 250, 96 NE

1036, 37 LRA(NS) 179, Ann Cas 1912C, 1209 (1911). See *infra*, section 121, for the legality of picketing to compel employment of members of a union in addition to or in substitution for the owner, his partner, or members of his family.

13. 49 Stat 449 (1935), 29 USCA Sections 151-166. The Act is analyzed and discussed *infra*, at chapter sixteen.

protest the introduction of labor saving machinery is, as above seen, presently in a state of conflict. A vexing aspect of the problem involves the conflict of men with men-displacing machines, a quarrel which is as old as the industrial revolution. Early English machine wrecking parties inspired many volumes designed to show the beneficial effect of the introduction of machinery. The French economist Jean Baptiste Say wrote in his *Treatise on Political Economy* in 1803 that machines were socially advantageous because they gave occupation to workers to construct them, and created new business and more work to be performed by lowering the cost of and hence public accessibility to the product.¹⁴ Present-day workingmen's complaints, on the other hand, include the arguments that machines serve but to cut down employment opportunities because demand is too inelastic to respond to the lower prices made possible by machine made production, and that, whatever be the ultimate effect, loss of employment is the only immediate consequence following the introduction of machinery.¹⁵ The effect of technological progress and change upon employment has been examined from the employer's viewpoint in a publication entitled *Machinery, Employment and Purchasing Power*, issued in 1936 by the Na-

14. c/f Charles Gide, *Principles of Political Economy* (1924), where machines are distinguished as being either beneficial, as where they increase the availability of hitherto relatively unavailable products, or detrimental, as where they merely serve to manufacture more quickly a fixed quantity of goods.

15. New York Times, June 25, 1940, p. 24: "Special to the New York Times. Chicago, June 24th. Michael Carrozzo, leader of the city's street and construction laborers, and nine other union officials and two unions were charged with conspiracy to violate the Sherman Anti-Trust Act today in a Federal indictment. They are accused of conspiring to restrain

the use of ready-mixed concrete in the Chicago area. . . . The charge is made that through strikes and threats of strikes Carrozzo and the others forced paving contractors in the Chicago area to agree with union demands that on jobs using truck mixers (a truck on which concrete is mixed en route to the job) the same number of men must be employed as if the concrete were mixed in a stationary mixer. Another charge is that building contractors were prevented from using the more economical truck mixers at all, and that manufacturers and purchasers of such mixers were warned that to use them was not permitted in the Chicago area."

tional Industrial Conference Board, and in another publication by Harold G. Moulton, entitled: *The Formation of Capital*, published by the Brookings Institution at Washington, D. C. in 1935. In the former work it is contended that the introduction of new machinery has meant an enhancement and not a diminution of employment opportunities through the dissipation of past investments and the necessity for new and in many cases large investments. In addition, machinery is credited with having made possible the standard of living enjoyed by American workingmen. In the latter work, the author challenges the assertion that machinery is a substantial factor in causing depressions by making possible if not inevitable an overproduction of goods. It is pointed out that the dollar value of consumers' goods remained the same during the period from 1919 to 1929, and this in spite of the vast technological change which took place during that period.¹⁶

Section 90. Strikes to Procure Discharge of Fellow Employees.

A strike to procure the discharge of a fellow employee may have its inception in part of a plan to procure a closed shop. In such a case the strike is legal if the strike for a closed shop is legal in the given jurisdiction. "The privilege to demand a closed shop necessarily includes the demand that employees refusing to be members of the union be not continued in employment."¹⁷ Discharge of a fellow employee may also be sought by a strike simply because of the obnoxious character of the employee whose discharge is sought, or because the disliked employee, acting in a supervisory capacity, has been too rigid in the enforcement of rules or in the general management of supervision. In the former case a strike has been held both legal¹⁸ and illegal¹⁹ while as to the latter case, the single

16. See also, to like effect, *Dollar Values of Production of Goods and Construction* (1934), published by the National Industrial Conference Board.

17. Rest. Torts (1939) Sec 790,

Comment a. See section 97, *infra*, for the legality of the strike for a closed shop.

18. *Berry v. Donovan*, 188 Mass 353, 74 NE 603, 3 Ann Cas 738, 5 LRA(NS) 899, 108 Am St Rep 499
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case on the subject holds the strike illegal.²⁰ There is a third conceivable situation, involving a strike to procure the discharge of a supervisory employee on account of his discrimination against employees engaged in union activity or because of his interference, restraint or coercion in connection with the organizing activities of employees. Cases involving anti-union activities of supervisory employees under the National Labor Relations Act are numerous.²¹

The Restatement of Torts (Sec. 790) recognizes the legality of concerted action by employees for the purpose of procuring the dismissal of fellow employees either because of their obnoxious habits, conduct or character or because of their failure or refusal to become or properly to remain a member of the union. It is added, however, that "the rule stated in this section applies to the case of the employer whether or not the dismissed employee has a cause of action." The addendum is debatable since it would seem that a strike or other labor activity should be held illegal where the employee whose discharge is thereby sought has a valid cause of action for the resulting discharge.²²

(1905). See also *Heywood v. Tillson*, 75 Me 225, 46 Am Rep 373 (1883).

19. See *De Minico v. Craig*, 207 Mass 593, 94 NE 317, 42 LRA(NS) 1048 (1911), *State v. Donaldson*, 32 NJL 151, 90 Am Dec 649 (1867); *People ex rel Gill v. Smith*, 5 NY Crim Rep 509, 10 NY St R 730 (1887, aff'd 110 NY 633, 17 NE 871 (1889)).

20. *De Minico v. Craig*, 207 Mass 593, 94 NE 317, 42 LRA(NS) 1048 (1911).

21. See *infra*, sections 292, 299. Suppose a group of employees struck because of the employer's refusal to discharge a fellow employee for union activity—could the employer, consistent with the National Labor Relations Act, then discharge such

fellow employee? It would seem to be clear that he could not. The decisions of the National Labor Relations Act are to the effect that an employer may not violate the act for any reason, even if necessary to save his business, as in the case of a jurisdictional dispute. See *infra*, section 316. Moreover, the employer has been held under the National Labor Relations Act to owe an affirmative duty toward his union-minded employees, to prevent them from physical attack or embarrassment perpetrated upon such employees by fellow-employees. See *infra*, section 285.

22. *c/f* *Hest., Torts* (1939), Secs 809-812.

Section 91. Strikes to Compel Collective Bargaining or Union Recognition.

Upon the ground that labor activity must be concerned solely with the achievement of immediate benefits,²³ or because labor unions should not be permitted to intermeddle in the employment relationship,²⁴ it has been held that a strike to compel collective bargaining or recognition of a union is illegal.²⁵ The authority of such cases, in the light of labor law developments of the last decade, is at least doubtful. The Restatement holds that employees may engage in concerted action to compel collective bargaining or union recognition (Sec. 785). The notions of an "appropriate unit" and the employer's obligation to bargain with none but appropriate bargaining representatives under the National Labor Relations Act has raised serious problems involving the right of minority unions to strike, picket or boycott in the face of the existence of a contract entered into by the employer with the appropriate bargaining representatives of his employees pursuant to the machinery of the National Labor Relations Act or prototype state legislation.²⁶

In a number of cases, strikes have been called for the purpose of compelling an employer to engage in negotiations incident to the process of collective bargaining. Thus it has been held in one case that a strike called to compel an employer to enter into an arbitration agreement is legal,²⁷ but in another the opposite was held,²⁸ and where the employees demand that union representatives adjust

23. *Folsam v. Lewis*, 308 Mass 336, 94 NE 316, 35 LRA(NS) 787 (1911).

24. *Turnstall v. Stearns Coal Co.* 192 F 808, 13 CCA 132, 41 LRA(NS) 453 (CCA C. 1911).

25. *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass 537, 130 NE 86, 20 ALR 1509 (1921). A boycott for the same purpose has also been held illegal. See *infra*, section 149. See also *Re Higgins*, 27 F 443 (CCND Texas 1886); *Wabaah Rd. Co. v. Han-*

nahan, 121 F 563 (CCED Mo 1903). *Contra: Michaels v. Hillman*, 112 Misc 395, 183 NYS 195 (1920).

26. See *infra*, section 211, for a discussion of the law governing such situations.

27. *Auburn Draying Co. v. Wardell*, 227 NY 1, 124 NE 97, 6 ALR 901 (1919). See also *Rest. Torts* (1939) Section 791.

28. *Folsom Engraving Co. v. McNeil*, 235 Mass 269, 126 NE 479 (1920).

grievances existing between an employer and his individual employees, a strike to enforce such a demand has been held illegal.²⁹ It has also been held that a strike is legal where called to protest failure by an employer to keep an engagement made to discuss the contractual relationship of the parties.³⁰

Section 92. Strikes to Compel Use of Union Label.

Striking or picketing to compel use by an employer of a union label has been held legal in the two cases where the question has arisen.³¹ It has, however, been held that the refusal to handle goods or materials because they did not bear the union label is illegal and may be enjoined.³²

Section 93. Strikes to Enforce Fine or Penalty.

As has been seen in connection with discussion of the crime of extortion,³³ a strike to compel an employer to pay a fine or a penalty levied against him by the union has been held illegal.³⁴ A distinction must be drawn, however, between the case where a strike is called for the purpose of collecting an illegal fine and one where it is called to enforce payment of liquidated damages payable by an employer for the breach of a collective bargaining agreement.³⁵ Again, a union has a right, in the exercise of discipline upon its members, and for the purpose of combating the practice by employers of paying to their employees less money than that provided for in a collective bargaining agreement, to

29. *Reynolds v. Davis*, 198 Mass 294, 84 NE 457, 17 LRA (NS) 162 (1908). It has also been held that a strike called to enforce a union demand that employees be discharged only for reasonable cause, and that the union be the sole arbiters of what was meant by reasonable cause, is illegal. *Pre' Catelan v. International Federation of Workers*, 114 Misc 662, 188 NYS 29 (1921).

30. *Walton Lunch Company v. Kearney*, 236 Mass 316, 128 NE 429 (1920).

31. *Justin Seubert v. Reif*, 98

Misc 402, 164 NYS 522 (1927); *Public Baking Co. v. Stern*, 127 Misc 229, 215 NYS 537 (1926). See in *fra*, sections 468, 469, for a discussion of legislation dealing with the union label, and cases interpreting such legislation.

32. *Black & Boyd Mfg. Co. v. Local No. 514*, 10 Law & Labor 260, 267 (DCD Mich 1928).

33. See *supra*, section 39.

34. *Accord: Rest. Torts* (1939), sec 792.

35. *Maisel v. Sigman*, 123 Misc 714, 205 NYS 807 (1924).

order the employees employed by such employers to be removed therefrom for one year.³⁶

It has been held, on the other hand, that a strike called for the purpose of protesting the employment of men below given rates is unlawful, where, as a condition to calling off the strike, it is demanded that the employer pay a penalty determined by the employees' combination.³⁷

A strike to enforce a fine on an employer for violation of a union rule against the employment of non-union men on the job has been held invalid in Connecticut, New Jersey and Massachusetts.³⁸ In the last state, the court likewise condemned a strike seeking to compel the employer to accede to a demand that disputes be settled only by the union council.³⁹ In *Grassi Contracting Co. v. Bennett*,⁴⁰ the plaintiff employer sought to enjoin a labor union from striking to compel him to employ a foreman over each job for a period of one year, to observe that the workers were not being employed at hours longer than those prescribed by the terms of the collective bargaining agreement. It appeared that the employer had worked his employees for longer hours than those to which he had theretofore agreed with the union, and that the employment of the foreman was to be a form of punishment of the employer for his past offense and also a form of protection for future compliance. The court held the strike bad as constituting an activity designed to punish rather than one intended to benefit the workers.

Section 94. Strikes to Procure Commission of Illegal Act.

For obvious reasons, a strike called to procure the com-

36. *O'Keefe v. Local 463, United Assn. of Plumbers*, 277 NY 300, 14 NE(2d) 77, 117 ALR 817 (1938); *Brennan v. United Hatters*, 73 NJL 729, 65 A 165, 9 LRA(NS) 254, 118 Am St Rep 727, 9 Ann Cas 698 (1906).

37. *Master Stevedores' Assn. v. Walsh*, 2 Daly 1 (1867).

38. *March v. Bricklayers' Union*, 70 Conn 7, 63 A 291, 7 LRA(NS) 1198, 118 Am St Rep 127, 6 Ann Cas 848 (1906); *Carew v. Rutherford*, 106 Mass 1, 8 Am Rep 287

39. *Reynolds v. Davis*, 198 Mass 294, 84 NE 457, 17 LRA(NS) 162 (1908).

40. 174 AD 244, 160 NYS 279 (1916).

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mission by an employer of an illegal act is unlawful.⁴¹ Passage of the Norris Act⁴² and the National Labor Relations Act,⁴³ the one insulating labor activity from the remedy of injunction, the other imposing upon the employer the obligation, among others, to bargain exclusively with the proper bargaining representatives of his employees, induced contentions to be made that striking or picketing or boycotting carried on by a union not representing a majority of the employer's employees, especially if connected with a jurisdictional dispute, are illegal because seeking to induce an employer to engage in the allegedly illegal act of bargaining with employees' representatives not properly qualifying under the National Labor Relations Act. The matter is fully discussed in subsequent sections.⁴⁴

Section 95. Strikes to Compel Payment of Stale Claim.

A strike to compel the payment of a stale disputed claim is not a proper strike, since legal forums are open for the purpose of adjudicating the validity or invalidity and collectability of such a claim.⁴⁵ It has also been held unlawful to picket for the purpose of coercing the settlement of a cause of action for damages.⁴⁶

Section 96. Strikes to Compel Non-Resident Employer to Observe More Advantageous Working Conditions.

Union constitutions, rules or by-laws, or collective bargaining agreements sometimes provide that the rates of pay or the hours of wages in connection with which union men are to be employed shall be determined by the conditions prevailing either at the employer's residence or by the place where the work is carried on, whichever are more ad-

41. See *Toledo, A. A. & N. M. R. Co. v. Pennsylvania Co.* 54 F. 730, 19 LRA 387, 5 IC Rep 522 (CCND Ohio 1893). Accord. *Rest. Torts* (1939), Section 794.

42. 47 Stat 70 (1932), 29 USCA Sections 201-115.

43. 48 Stat 449 (1935), 29 USCA Sections 151-186.
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44. See *infra*, sections 130-133, and section 211.

45. *Dorchy v. Kansas*, 272 US 306, 47 S Ct 88, 71 L Ed 248 (1926).

46. *Jensen v. St. Paul Moving Pictures*, 149 Minn 58, 239 NW 611 (1925). See *Samuel Hertzog Corporation v. Gibbs*, 295 Mass 229, 3 NE (2d) 831 (1936).

vantageous to the workingmen. It has been held in some cases that such stipulations are valid, and that a strike to enforce observance thereof is consequently unenjoinable.⁴⁷ "The argument in support of this view is that the better class of union workmen tend to flock to the larger cities, where, because of their greater skill and efficiency, their services command the higher union wage; that, when they are sent to communities where the lower union wage prevails, the local worker working at the lower union scale becomes dissatisfied; and that on the whole the welfare of the union requires that under such circumstances the members shall be on a footing of equality. It has also been said that the rule tends to preserve the desirable balance between the local labor supply and the amount of work available in the locality."⁴⁸

In *Rambusch Decorating Company v. Brotherhood of Painters*,⁴⁹ which was a proceeding brought to test the validity of such a stipulation under the Sherman anti-trust law, it was held that such a stipulation is valid and does not collide with the censure of the Sherman law, even though there were further provisions which required the employer to hire a certain percentage of local workingmen if they were available, and it appeared that the working conditions at the employer's residence were much more advantageous to workingmen than those prevailing at the place where the work was carried on.

A case holding against the validity of the stipulation discussed in this section is *J. I. Hass v. Local Union*,⁵⁰ where the court explained its reasons for so holding by stating:

47. *Barker Painting Company v. Local Union*, 12 F(2d) 945 (DCD NJ 1926); *Barker Painting Company v. Local Union*, 15 F(2d) 16 (CCA 3, 1926); *New Jersey Painting Company v. Local Union*, 96 NJ Eq 632, 126 A 399, 47 ALR 384 (1924), *H. Newton Marshall Company v. Brotherhood of Painters*, Court of Common Pleas, Philadelphia Co. (unreported, cited in the last cited *Barker Painting Company* case); *Geo. A.*

Douglas & Bro v. Mallette, Superior Court, Rhode Island (unreported, cited in the last cited *Barker Painting Company* case). See also *Glicman v. Barker Painting Co.* 227 AD 585, 238 NYS 419 (1930).

48. Annotation, *Purposes for which Strike may lawfully be called* (1928), 71 L Ed 248, 251.

49. 105 F(2d) 134 (CCA 2, 1939).

50. 390 F 894 (DCD Conn 1924).

" . . . the effect of the rule in question is to make it difficult if not impossible for an outside contractor to compete with a local contractor in the business . . . wherever the rate of wages . . . is more favorable to the workman in the contractor's home territory than at the place where the work is to be done, to the injury of not only the outside contractor, but also of the public of the place where the work is to be done."

Section 97 Strike for Closed Shop—Legality in General.

The most significant present day primary strike is that to achieve the closed shop. In the period 1916-1932, strikes for union recognition alone or in conjunction with other causes were second in importance. The many recent cases on the point indicate the even greater prevalence of such strikes today. In *Gill Engraving Co. v. Doerr*,⁵¹ a shop is said to be "open" when both non-union and union men are therein employed, and "closed" when either unionism or non-unionism results in the exclusion of an applicant from employment.⁵² The general understanding, however, differs from such a distinction. The open shop has, in many instances, to be sure, made no discrimination between union and non-union employees. More often, however, the open shop has been coupled with careful plans to exclude the influences of unionism. The device of the yellow-dog contract was utilized mainly to insure to the employer continuance of an open shop. The company union illustrates still more recent resort to the practice. As used in this work, the closed shop comprehends industrial enterprise wherein union affiliation is a condition of employment.⁵³

51. 214 F 111 (DCSD NY 1914).

52. See also *Irving v. Joint Dist. Council*, 180 F 896 (DCSD NY 1914); *Sackett v. National Assn.* 61 Misc 150, 113 NYS 110 (1908) reversed on other grounds, 148 AD 598, 133 NYS 372 (1912), reversed 211 NY 554, 105 NE 1102 (1914).

53. "A closed shop, as popularly understood in the United States, is a

place of employment where none but union members may work." *Leiser son, Closed Shop and Open Shop*, 3 *Ency of the Soc Sci* 568 (1930). See also *Duplex Printing Press Co. v. Deering*, 252 F 722 (CCA 8, 1918) reversed on other grounds, 254 US 443, 41 S Ct 172, 65 L Ed 342, 16 ALR 196 (1921).

A distinction is sometimes drawn between labor activity designed to unionize, and like activity seeking to secure a closed shop. There is logical ground for such a distinction, for a unionized shop need not necessarily be a closed shop. Preferential treatment of one kind or another may be the sole extent of unionization. But labor has considered the closed shop as a necessary consequence of unionization, because membership and the payment of dues are difficult to obtain and enforce where non-union employees, without union obligations, are able to secure like privileges. Discussion of the closed shop may therefore likewise be held to include analysis of the law's attitude toward labor's efforts in behalf of unionization. A further distinction between a "union shop" and a "closed shop" needs to be noted. The union shop is sometimes used to describe a shop wherein the employer is free to choose his employees from the open market with the proviso that, after a given probationary period, they become members of the given union. Labor considers the union shop thus defined as a temporary compromise, sometimes necessary to accustom employees to dealing with unions, the closed shop being the ultimate goal.⁵⁴

In *Oakes on Organized Labor and Industrial Conflicts*,⁵⁵ it is stated that the majority rule in the United States is opposed to the strike for the closed shop, but the cases no longer support the statement. Of the twenty-five states which have most directly passed upon the question, fourteen favor such a strike, while eleven are opposed. The jurisdictions which at present favor such a strike are California, Colorado, Connecticut, Florida, Idaho, Illinois, Indiana,

54. See, in this connection, *Folsom Engraving Co. v. McNeil*, 235 Mass 260, 126 NE 479 (1920) holding a strike to have as its purpose one to achieve a closed shop, though professedly called to compel execution of a collective bargaining agreement under the terms of which the employer, although not agreeing to discharge existing non-union employ-

ees, undertook to give preference to members of the union in employment and to hire men from the open market only where the union failed or refused to furnish competent men upon the employer's demand.

55. (1926), Section 292. See also Annotation, Purposes for which Strikes may lawfully be called (1928), 71 L Ed 248, 262.

Maryland, Minnesota, Montana, New York, Oklahoma, Rhode Island and Wisconsin,⁵⁶ while those which view it with disfavor are Delaware, Georgia, Maine, Massachusetts, Missouri, New Hampshire, New Jersey, Oregon, Pennsylvania, Texas and Vermont.⁵⁷ A recent statutory trend needs to

56. California.—*Parkinson v. Building Trades Council*, 154 Cal 581, 98 P 1027 (1908). But see *Moore v. Cooks Union*, 39 Cal App 538, 179 P 417 (1919).

Colorado.—*Denver Local Union v. Perry Truck Lines, Inc.* 101 P(2d) 436 (Colo 1940); *Hirano v. Journeymen Cooks Union*, 1 Colo Dec Supp 160.

Connecticut.—*Cohn & Roth Electric Co. v. Bricklayers Union*, 92 Conn 161, 101 A 659, 6 ALR 877 (1917). See also *State v. Stockford*, 77 Conn 227, 58 A 769 107 Am St Rep 28 (1904). c/f *State v. Glidden*, 55 Conn 46, 8 A 890, 3 Am St Rep 23 (1887).

Florida.—*Jetton Dekle Lumber Co. v. Mather*, 53 Fla 909, 43 S 590 (1907).

Idaho.—*Robison v. Hotel & Restaurant Employees Local*, 35 Ida 418, 207 P 132 (1922).

Illinois.—*Kemp v. Division No. 241*, 255 Ill 213, 99 NE 349 (1912). *Contra: O'Brien v. People*, 216 Ill 354, 75 NE 108 (1905). See also *Nusbaum v. Retail Clerks*, 227 Ill App 206 (1922).

Indiana.—*Shaughnessey v. Jordon*, 184 Ind 499, 111 NE 622 (1916).

Maryland.—*Bricklayers Union v. Ruff*, 160 Md 483, 164 A 754 (1931) overruling to that extent (by implication) but without citing *Blandford v. Duthie*, 147 Md 388, 128 A 138 (1925).

Minnesota.—*Grant Construction Co. v. St. Paul Bldg. Trades*, 136 Minn 167, 161 NW 890 (1917).

Montana.—*Empire Theatre Co. v. Clark*, 53 Mont 183, 128 P 107. LRA 276

1917E, 383 (1917).

New York.—*National Protective Association v. Cumming*, 170 NY 315, 63 NE 367, 58 LRA 135, 88 Am St Rep 648 (1902), overruling by citing a distinction without a difference, *Curran v. Galen*, 152 NY 33, 46 NE 297 (1897).

Oklahoma.—*Roddy v. United Mine Workers of America*, 41 Okla 621, 139 P 126, LRA1915D, 789 (1914).

Rhode Island.—*Rhodes Brothers Co. v. Musicians Protective Union*, 37 RI 281, 92 A 641 (1915).

Wisconsin.—*Adler & Sons Co. v. Maglio*, 200 Wis 153, 228 NW 123, 66 ALR 1085 (1929), overruling *A. J. Monday Co. v. Auto Workers*, 171 Wis 532, 177 NW 867 (1920).

By Section 111.06 of the Wisconsin Employment Peace Act as amended in 1939 (Laws, 1939, Chapter 57) it is provided that "an employer shall not be prohibited from entering into an all-union agreement with the representatives of his employees in a collective bargaining unit, where three-quarters or more of the employees in such collective bargaining unit shall have voted affirmatively by secret ballot in favor of such all-union agreement in a referendum conducted by the board." Section 111.02 (9) defines an "all-union agreement" to mean "an agreement between an employer and the representatives of his employees in a collective bargaining unit whereby all the employees in such unit are required to be members of a single labor organization."

57. Delaware.—*Sarros v. Nouria*, 15 Del Ch 361, 158 A 607 (1927).

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be noted, for the strike for the closed shop will thereby be affected. Reference is made to state anti-injunction acts

Georgia.—*McMichael v. Atlanta Envelope Co.* 151 Ga 776, 108 SE 226 (1921).

Maine.—*Keith Theater v. Vachon*, 134 Me 187, 197 A 612 (1918); *State v. Mackenay*, 200 A 511 (Me 1938)

Massachusetts.—*Folsam Engraving Co. v. McNeil*, 235 Mass 269, 126 NE 479, 35 LRA(NS) 787 (1920); *United Shoe Machinery Corp. v. Fitzgerald*, 237 Mass 537, 130 NE 86 (1921); *Aberthaw Constr. Co. v. Cameron*, 194 Mass 208, 80 NE 478 (1907); *Folsam v. Lewis*, 208 Mass 336, 94 NE 316, 35 LRA(NS) 737 (1911); *Martineau v. Foley*, 225 Mass 107, 113 NE 1038 (1916), *Hanson v. Innis*, 211 Mass 301, 97 NE 756 (1912); *W. A. Snow Iron Works, Inc. v. Chadwick*, 227 Mass 382, 116 NE 601, LRA1917F 755 (1917); *Cornellier v. Haverhill Mfrs Ass'n* 221 Mass 554, 109 NE 643, LRA1916C 218 (1915); *Goyette v. Watson Co.* 245 Mass 577, 140 NE 285 (1923); *Alden Bros. v. Dunn*, 264 Mass 355, 162 NE 773 (1928); *Plant v. Woods*, 176 Mass 492, 57 NE 1011, 51 LRA 339, 79 Am St Rep 330 (1900). Although Massachusetts holds a strike to enforce a collective agreement in valid (*United Shoe Machinery Corp. v. Fitzgerald* [supra]) even where the employer breaches the same (*Samuel Hertzig Corp. v. Gibbs*, 285 Mass 229, 3 NE(2d) 831 [1936]) a strike is held valid to compel an employer to give his entire work to the striking union instead of apportioning part of it among other workers (*Pickett v. Walsh*, 192 Mass 572, 78 NE 763, 6 LRA(NS) 1067, 116 Am St Rep 217, 7 Ann Cas 638 [1906]). In *Sayre, Labor and the Courts* (1930), 39 Yale LJ 682, 697, the author states: "Neither the Massachusetts Courts nor anyone else has

been able to reconcile or adequately to explain such conflicting decisions as *Plant v. Woods* and *Picket v. Walsh*." See, however (note) 45 Harv L Rev 1226 (1932), in which connection see *Landis, Cases on Labor Law* (1934) at Page 319, indicating the difficulty of applying the case of *Picket v. Walsh*. The Massachusetts Court has likewise held valid a collective agreement under the terms of which the employer undertook not to use any non-union made materials, but in the same decision a strike to enforce the agreement was held illegal. *A. T. Stearns Lumber Co. v. Howlett*, 260 Mass 45 (1927).

Missouri.—*Clarkson v. Laiblan*, 178 Mo App 708, 161 SW 660 (1913).

New Hampshire.—*White Mountain Freezer Co. v. Murphy*, 78 NH 398, 101 A 357 (1917).

New Jersey.—*Canter v. Retail Furniture Employees*, 122 NJ Eq 575, 196 A 210 (1937) which settled the New Jersey law, hitherto seeming to indicate a more favorable attitude toward the closed shop. The *Canter* case contains an outright prohibition of the closed shop and the strike or picket therefor in New Jersey; thereby seeming to restate the early New Jersey law, *Ruddy v. United Ass'n* 79 NJL 467, 75 A 742 (1910); *Baldwin Lumber Co. v. Int'l Brotherhood*, 91 NJ Eq 240, 109 A 147 (1920); *Prospect Garage v. Funeral Car Operators* 12 Law & Labor 178. c/f *McPherson Hotel Co. v. Smith*, 12 NJ Eq 167, 12 A(2d) 136 (1940).

Oregon.—*Moreland Theatres Corp. v. Portland Union*, 140 Or 35, 12 P (2d) 333 (1932); *Starr v. Laundry and Dry C. Workers L. Union* (Or) 63 P(2d) 1104 (1936).

Pennsylvania.—*Erdman v. Mitchell*, 207 Pa St 79, 56 A 327 (1903);

applying only to cases involving "labor disputes" which, sometimes in connection with labor relations acts otherwise following more or less closely the provisions of the National Labor Relations Act, define the words "labor dispute" in terms of a controversy between an employer and a majority of his employees in the proper bargaining unit." Immunity from injunction in connection with strikes for the closed shop would accordingly be afforded to a strike called for the closed shop, among other things, only where carried on with the approval of a majority of the employer's employees. The State of Wisconsin goes further, to require an affirmative vote at a secret ballot of three-fourths of the employees in an appropriate bargaining unit as the condition to the validity, under the State Labor Relations Act (known as the "Employment Peace Act"), of an "all-union" or closed shop agreement.⁶⁰

Section 98. Strike for Closed Shop—Relation to Public Policy against Monopoly.

In some cases, the strike for the closed shop has been held invalid upon the ground that it is an activity concerned not with an immediate demand, such as for higher wages, less hours or better conditions of employment, but rather with a prelude to such demands and hence unjustified. "Strengthening the forces of a labor union," it has accordingly been stated,⁶¹ "to put it on a better condition to enforce its claim in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employees to strike." The dissenting opinion, however, of Mr. Justice Holmes in *Plant v. Woods*,⁶² probably states more accurately the present

Rausbach v. Reiff, 244 Pa 559, 91 A 224 (1914).

Texas.—*Cooks Union v. Papageorge*, 230 SW 1086 (Tex Civ App 1921); *Webb v. Cooks Union*, 205 S W 465 (Tex Civ App 1918).

Vermont.—*State v. Dyer*, 67 Vt 890, 22 A 841 (1894).

58. Oregon Laws of 1939, c. 2; 276

Pennsylvania Purdon's Ann Stats Title 43, and L 1939, c. 57; 1939 Wisconsin Stats c. 25, Section 103.62.

59. L 1939, c. 57. Wisconsin Employment Peace Act, Section 111.06.

60. *Folsam v. Lewis*, 308 Mass 336, 34 NE 316, 35 LRA(NS) 787 (1911).

61. 176 Mass 492, 57 NE 1011, 51 LRA 339, 79 Am St Rep 330 (1900).

state of the law in this connection: "The immediate object and motive was to strengthen the defendants' society as a preliminary and means to enable it to make a better fight on questions of wages or other matters of clashing interests. I differ from my brethren in thinking that the threats were as lawful for this preliminary purpose as for the final one to which strengthening the union was a means. I think that unity of organization is necessary to make the contest of labor effectual, and that societies of laborers lawfully may employ in their preparation the means which they might use in the final contest." So also in *Cohn & Roth Electric Co. v. Bricklayers Union*,⁶² the court said: "The end the defendants had in view was the strengthening of their unions. That was a legitimate end." But with these judicial expressions must be compared the case of *Miller v. Fishworkers Union*,⁶³ which involved an injunction proceeding brought by two brothers and a sister, joint proprietors of a retail fish store. The plaintiffs refused to enter into an agreement with the defendant union because, having no employees, they needed no union agreement. The defendant union contended, however, that such an agreement was necessary (and hence picketing to coerce its signing proper) to guide the plaintiffs' relationship with the union in the event the business should so prosper that employees would be needed. The court enjoined the picketing, and overruled the defendant's contention. "In the instant case," said the court, "we have an illustration of picketing being conducted not to enforce higher wages, better working conditions, shorter hours; but, instead, to provide a cushion against a future exigency, which exigency has no existence and is not yet in being, which, in fact may never arise, and which is indeed highly speculative so far as the time of actual occurrence is concerned."

The validity of the strike for the closed shop is more generally tested, however, in proceedings brought by a discharged non-union employee complaining of interference

⁶² 92 Conn 161, 101 A 659, 6
ALR 887 (1917).

⁶³ 170 Misc 713, 11 NYS(2d) 278
(1939).

with an asserted right to work, or by an employer upon the theory either that the strike seeks to coerce an illegal because monopolistic collective bargaining agreement or that it constitutes an interference with the employer's right to free access to the labor market. In either case, courts which hold the strike for the closed shop illegal do so because its purpose, being to achieve a monopoly, is contrary to the common law's asserted aversion to contracts and combinations in restraint of trade. Accordingly, for example, in *Anderson v. Shipowners Association of the Pacific Coast*⁶⁴ it was held that a suit was maintainable under the Sherman and Clayton Acts by a seaman, to enjoin as a combination in restraint of trade, maintenance of an agreement between an association of shipowners and a labor union known as the Seaman's Union of America, under the terms of which the shipowners undertook to employ none but seamen who were members of the union and who had been certified to the shipowners as employable by the union.

Controversy concerned with the legality of the closed shop and labor activity seeking to coerce the closed shop has been bitter and has occasioned much rhetoric. It has been asserted, for example, that the closed shop is "intolerant and un-American" and that "it kills the unspeakable joy of achievement and turns the workmen from being a redblood man into a cloak and a meal ticket" or that "it drives a dagger into the very heart of freedom and if persisted in, it will lead to the very collapse of idealism."⁶⁵ Legality, upon the other hand, usually rests upon the theory, more or less clearly expressed in the cases, that the evil of monopoly is outweighed by the benefits of trade unionism.⁶⁶

64. 272 U.S. 359, 47 S. Ct. 125. 71 L. Ed. 847 (1926).

65. George B. Vosburgh, *The Peril in the Labor Situation and the Way Out*, Constitutional Review, January, 1922.

66. Sometimes it is suggested that an employer may legally enter into a closed shop contract because he

has a right to select those with whom he shall in the future contract. *Terrio v. Nielson Construction Company*, 30 F. Supp. 77 (DCED La. 1939). The argument might as well be made that the vendor of a business may legally enter into an unreasonable restrictive covenant because he has a right to determine how he shall do

In a few cases, however, the conflict between the policy against monopoly and that in favor of trade unionism is resolved in quite a different manner. Labor activity designed to coerce a closed shop alike with closed shop contracts are said to be legal only where a single shop is involved, or at least but a few of a given industry are concerned. Should the closed shop extend to an entire industry, however, it is said to be illegal as an unreasonable restraint of trade. Thus in *Connors v. Connolly*⁸⁷ it was held that a contract entered into between the labor unions and substantially all of an important industry of a given locality was void because seeking to create an illegal monopoly. And in *Polk v. Cleveland Ry. Co.*⁸⁸ a closed shop contract involving a street railway company operating all city street car lines was held illegal, the court stating that "contracts by which an employer agrees to employ only union labor are contrary to public policy when they take in an entire industry of any considerable proportions in a community so that they operate generally in that community to prevent or seriously deter craftsmen from working at their craft or workmen from obtaining employment under favorable conditions without joining a union."⁸⁹

business in the future. The assumption of all the discussion connected with the closed shop is that the individuals engaged in the particular closed shop controversy or concerned in the closed shop contract are not free to do that which they wish or are asked to do, or even have contracted to do, but that overhanging the transaction are (1) emphasis by the common law upon the individual's right to keep himself free to trade, irrespective of his countervailing contracts; (2) the rule of law that non-parties to monopolistic transactions are injured by those transactions and hence should be permitted to destroy their validity if they interfere unduly with the right of the non-parties to a free and open market. See *supra*, sections 11-23, for

a discussion of the right to a free and open market.

87. 86 Conn 641, 86 A 600, 45 LRA(NS) 564 (1913). "The contracting employers include all the manufacturers, with two exceptions, in the chief industry of Danbury district. We held in *Connors v. Connolly* such an agreement against public policy and void." *Associated Hat Mfrs. v. Baird*, 88 Conn 332, 91 A 363 (1914). Accord: *Hat Shop v. Scully*, 98 Conn 1, 118 A 55 (1922). *c/f Cohn & Roth Electric Company v. Bricklayers Union*, 92 Conn 161, 101 A 659, 6 ALR 887 (1917).

88. 20 Ohio App 317, 151 NE 808 (1925).

89. See also *Birmingham Paint Co. v. Crampton*, 39 S 1020 (Ala 1905); *Harper v. Local Union (Texas)* 43

In *Williams v. Quill*,⁷⁰ the court was presented with a set of facts almost identical with that presented by the *Polk* case, and held to the contrary.⁷¹ In the *Williams* case, the closed shop contract involved a union which had been certified under the State Labor Relations Law as the proper bargaining representatives of the employees in the industry. The discussion by the court in *Williams v. Quill* upon the subject may profitably be quoted: "The attorney for the plaintiffs has conceded that this contract is valid except in the one particular stated, which is that, as the defendant employers constitute the main transit and railroad lines in the locality stated, there is by this contract a monopoly created; that is, if only union men are to be employed, the plaintiffs, if they refuse to carry the union, will be without employment. Upon the argument counsel was led to state that carrying out this doctrine to its logical conclusion all such contracts would be illegal where the employer in a village or town or small community was the only one in that particular line of business. We think that this distinction is not justified and that if there be an evil in the monopoly

SW 1033 (1932). In *New Jersey*, it was indicated that the validity of the closed shop contract might be tested along the lines of the distinction noted in the text (*Four Plating Co. v. Mako*, 122 N.J. Eq 298, 194 A 53 [1937]), but it now seems that such a contract is totally invalid. *Canter v. Retail Furniture Employees*, 112 N.J. Eq 575, 193 A 210 (1937). See, however, *infra*, section 431. The Restatement of the Law of Contracts has adopted the rule stated in the text (Section 515c, Illustration 18), and textwriters have likewise so stated the rule: Elliott on Contracts, Sec 1543; 2 Paige on Contracts, Sec 821; 5 *Pomeroy's Equity Jurisprudence*, Sec 2038; Williston on Contracts (Rev Edition) Section 1656. In 17 CJS 650 the rule is stated as though it were the well settled law: "closed shop contracts by the employers to employ

only union labor or contracts not to employ any union labor are valid where they do not operate generally in the community to prevent craftsmen from obtaining employment but are invalid as against public policy if they do so operate." See, in this connection, *Trade Press Pub. Co. v. Moore*, 193 NW 507 (Wis 1923), holding a contract obligating the parties thereto to bargain collectively valid, because not on its face one to secure a closed shop.

70. 277 NY 1, 12 NE(2d) 547 (1938), appeal dismissed, 303 US 621, 58 S Ct 650, 82 L Ed 601 (1938).

71. Accord: *Murphy v. Higgins*, 12 NYS(2d) 913 (1939). See also *Hoban v. Dempsey*, 217 Mass 168, 104 NE 717, LRA1915A 1217, Ann Cas 1915C 810 (1914); *Shinsky v. O'Neil*, 232 Mass 99, 121 NE 790 (1919).

of the labor market in a particular industry by labor organizations, it is a matter to be considered by legislatures and not by the courts. . . ."

There seems to be a good deal of sense in the arguments presented by either side of the problem posed in this section. Courts which deny validity to closed shop contracts which seek to control substantially an entire industry have in mind the employment opportunities of the non-union worker. And indeed, much discontent may be found among young workers who, because of failure to exhibit union affiliation, are denied work. Application to the given union for membership many times results either in exclusion or the granting of membership with the privilege of employment when a long list of older members is first exhausted. Criticism of the Fascist state has almost invariably included the argument that the apportionment of the field of business enterprise among the various syndicates inhibits if not destroys the possibility of entry into the business world of new competitive enterprise.⁷² Like criticism from workingmen's point of view may very well be levelled against the closed shop contract involving the exclusive labor union, with the resulting paradox that the labor movement stands accused of having forsaken kinship with the workers' world. Courts, on the other hand, which grant validity to closed shop contracts even though governing an entire industry, do so upon the plausible ground that employers have a right to be governed by those union rules only which likewise apply to competitors. Contracts generally applicable are more just than those which place the contracting parties at a disadvantage in the industry. From the viewpoint of the worker, therefore, the open shop is the means whereby a reckless and sometimes prodded minority might effectively hinder the will of the great number of workers in a given industry. And from the employers' viewpoint, the closed shop contends for a socially desirable purpose, for it seeks to establish a norm in industry. Equality of opportunity, treatment and industrial standards, can be achieved only

72. See Carmen Haider, *Capital and Labor under Fascism* (1930).

to the extent of equal conditions of employment throughout a given enterprise. Both capital and industry are consequently the ultimate beneficiaries of the closed shop. The suggestion made by the court in *Williams v. Quill*⁷³ that the ultimate solution of the problem is one of legislative, rather than judicial, determination does not appear to be quite a fair one, for the courts, having assumed jurisdiction to deal with the difficulty, may well be expected to think the matter through. As stated by a recent observer of the subject:⁷⁴ "Because the union shop contract directly affects the relative bargaining strength of worker and employer, the development of the judicial attitude toward it affords an excellent example of the functioning of courts as instruments of social control of property relationships. Recent events indicate that legislative enactment may play an increasing regulatory role. In the last analysis, however, under the present form of government, it may be expected that the courts . . . will continue to exercise substantial control over the future evolution of the union shop contract."

Section 99. Strike for Closed Shop—Relation to the "Open Union."

One solution suggested is that the closed shop contract should be held valid only where the union seeking enforcement thereof or other benefits thereunder reasonably admits to membership all qualified persons who desire to carry on the trade. In *Wilson v. Newspaper Union*,⁷⁵ the complainant was denied membership in a union which had entered into a closed shop contract with substantially all the employers in the industry, including the employer for whom the complainant had been working prior to execution of the contract. The sole ground assigned by the union for denying membership was that "the books of the union were closed to new membership by reason of the fact that many members in good standing of the union were unemployed."

73. 277 NY 1, 12 NE(2d) 347 (1935), app. dis. 303 US 621, 58 S Ct 656, 62 L Ed 601 (1938).
74. Despres, *The Collective Agree-*

ment for the Union Shop (1939), 7 Univ Chi L Rev 24, 86.

75. 123 NJ Eq 347, 197 A 720 (1938).

Thereafter the union notified the complainant's employer that it was breaching its contract with the union by continuing the complainant in its employ, whereupon the complainant sought the aid of chancery to restrain the union from interfering with his employment. The court granted the relief sought upon the ground that the closed shop contract was void as against public policy, because involving a union which, though seeking virtually to bind an entire industry to the terms and conditions of a closed shop contract, excluded qualified men in the trade from its ranks.⁷⁶ In *Willis v. Restaurant Employees*,⁷⁷ picketing by a labor union was enjoined, which sought thereby to induce an employer to discharge non-union colored employees where it appeared that the picketing union had theretofore rejected the same negroes' offers to join the union, because of the color of their skin. In *Dorrington v. Manning*,⁷⁸ an injunction was granted and damages were awarded to employees against a labor union which struck to secure their discharge from employment, where it appeared that the plaintiffs' applications for admission to the labor union had theretofore been rejected although plaintiffs were experienced in the trade and had continuously worked at their trade for many years prior to the formation of the union. In *Lucke v. Clothing Cutters*,⁷⁹ a non-union employee discharged because the defendant union notified his employer that he would otherwise be classified in the trade as a non-union establishment sought and was successful in obtaining damages against the union, the Court calling attention to the

76. A suggestion to like effect is contained in *Shinsky v. Neil*, 232 Mass 99, 121 NE 700 (1919) where the court said: "A union which has an agreement with an employer providing that all the work shall be given to members of the union or that a preference shall be given to members of the union employing workmen, would open itself to a serious criticism if it refused to admit to membership men qualified to perform

the work done by the union in question."

77. 26 Ohio NP (NS) 435 (1927)

78. 135 Pa Super 194, 4 A(2d) 386 (1939). See also *National Fireproofing Co. v. Mason Builders Association*, 169 F 259, 26 LRA(NS) 148, 94 OCA 535 (CCA 2, 1909): "Members of the union cannot be said to be monopolists when any qualified bricklayer can join a union."

79. 77 Md 306, 28 A 505, 19 LRA 408, 39 Am St Rep 421 (1893).

fact that the plaintiff's offer to become a member of the union had been rejected.

The Restatement of Torts also has taken the view that labor unions should be privileged to engage in concerted activity for the purpose of securing a closed shop only where membership is open to the outside workingmen's world. Concerted action is said not to be legal, as the ordinary activity involving efforts to secure a closed shop would be (section 788c), "When a demand for restriction does not involve either securing of work for union employees or the maintenance or increase of union membership, subject to reasonable regulation by the union, but is directed toward the establishment of a monopoly privilege in a group of present members of the union to the exclusion of every one else. . . ." It is also stated (section 810) that "Workers who in concert procure the dismissal of an employee because he is not a member of a labor union satisfactory to the workers are . . . liable to the employee if, but only if, he desires to be a member of the labor union but membership is not open to him on reasonable terms." The reasonableness of the terms is a question of fact in each case. The Restatement goes further than any of the reported cases, to indicate what would and what would not be reasonable terms or restrictions: "They may be unreasonable because they require him to pay an initiation fee which is unduly high in proportion to earnings in the industry, or because the initiation fee is unreasonably higher for him than for others. On the other hand, it is not unreasonable for a labor union to set standards of proficiency for its members and to require applicants for membership to conform to these standards. Nor is it unreasonable for it to refuse to retain as a member one who engages in activities antagonistic to it or is a member of a rival organization. Again, it is not unreasonable for the union to distribute available work among its members when it is scarce or to provide that the senior members of the union have a preference in taking jobs as they appear."

The suggestion made by the New Jersey court in the *Wilson* case, and which, as has been seen, the Restatement

of Torts also approves, is possessed of basic merit. Labor unions are no holier than the workers who compose them, nor are non-union workers outcasts of the industrial life except, in a realistic sense, to the extent that the industrial economy is unable to afford them employment. Labor unions which close their ranks to the public thereby assume a sovereignty which is not theirs to assume. The whole field of available workers should likewise be made available to the employer for choice with respect to skill and the many personality factors. The closed shop as an instrumentality of a labor union, membership wherein is reasonably open to the public, establishes a desirable rule governing industrial enterprise. The closed shop at the hands of a labor union which substantially excludes the public from its benefits, on the other hand, is a means whereby an anti-social monopoly is foisted upon the industrial body politic. The Congress of Industrial Organization has made much of the "aristocracy" nature of the American Federation of Labor. It has been asserted by the former that the latter has been seeking to monopolize the benefits of unionization for the favored crafts. It would seem reasonable to apply the identical criterion to labor unions in general, whether C. I. O. or A. F. L. insofar as they exclude the public from their ranks. Prompted by these considerations, the state of Wisconsin amended its Employment Peace Act⁸⁰ (originally modelled after the National Labor Relations Act) to provide (Section 111.06) that the Board created by the Act has the power to terminate an all-union agreement "whenever it finds that the labor organization involved has unreasonably refused to receive as a member any employee of such employer, and each such all-union agreement shall be made subject to this duty of the Board. Any person interested may come before the Board . . . and ask the performance of this duty." It is also provided in Pennsylvania, by Section 6(c) of the State Labor Relations Act,⁸¹ that closed shop agreements may be entered

80. Laws, 1939, Chapter 57, effective May 4, 1939.

81. Laws 1937, No. 294, effective

June 1, 1937, as am. Laws 1939, No. 162, effective June 9, 1939.

into with a labor organization which, among other things, "does not deny membership in its organization to a person or persons who are employees of the employer at the time of the making of such agreement provided such employee was not employed in violation of any previously existing agreement with said labor organization."^{81a}

However, the suggestion involves serious objections. The rationale underlying the Wilson case, for example, is that there are good unions and bad unions. Said the court in the Wilson decision: "For the consideration of the present case, labor unions may be divided into two groups. In that which included defendant, the union is an exclusive club, run for the benefit of its members and those fortunate persons whom it may elect. Its policies are boldly selfish. The other group comprises those unions which welcome to their ranks all good men in the same line of work, who will submit to the common discipline." The rule established in the Wilson case is thus at odds with the generally prevailing law, which does not seem presently to compel a labor union to accept a non-worker for membership,⁸² and with the prior New Jersey law.⁸³ Moreover, the rule accords to the judiciary a power to pry into the internal affairs of unions

81a. See also sections 41, 43 of the New York Civil Rights Law as amended in 1940, proscribing race, color or creed discriminations by labor organizations.

82. *Greenwood v. Building Trades Council*, 71 Cal App 159, 233 P 823 (1925); *McKane v. Adams*, 123 NY 609, 25 NE 1057, 20 Am St Rep 785 (1890); *Miller v. Ruehl*, 166 Misc 479, 2 NYS(2d) 394 (1938); *Boro Park Poultry Corp. v. Hellar*, 280 NY 481, 21 NE(2d) 687 (1939) (where the court seemed, however, to indicate possible qualifications to the rule: "The union, with perhaps some exceptions not material here is free to choose its own members and then to endeavor to obtain employment for its chosen members"); *Idem*.

Murphy v. Higgins, 12 NYS(2d) 913 (1939). *Harris v. Thomas*, 217 SW 1068 (Tex Civ App 1920).

83. *Mayer v. Journeymen Stonecutters Association*, 47 NJ Eq 519, 20 A 492 (1890). The court in the Wilson case proceeded upon the ground that the union has such a monopoly as to create a duty to the public to treat all reasonably and alike, similar to the duty imposed by the common law upon innkeepers and carriers. In *Cameron v. International Alliance*, 118 NJ Eq 11, 176 A 692 (1935) and *Collins v. International Alliance*, 119 NJ Eq 230, 182 A 37 (1935) labor unions were compelled to desist from subjecting "junior members" to unfair discrimination by "senior members."

to determine which are "good" and which are "bad" that will most probably involve great mischief.

Section 100. Strike for Closed Shop—Difficulty of Supervising Union's Internal Administration.

Finally, the union which is compelled to accept members against its wants will find other ways to restrict available employment to the favored membership, as by delegating appropriate powers to a friendly committee, or by such internal changes in the constitution, rules or by-laws of the union as will leave the unwanted members in little better position than if they were not members at all. It is well settled that the judiciary will not interfere with the internal administration or affairs of a labor union in the absence of fraud or such bad faith as introduces elements of malice or other factors of public policy,⁸⁴ unless the constitution or by-laws have been violated,⁸⁵ and even then only where the allegedly aggrieved member has exhausted his remedies within the association.⁸⁶ It is for the union and not for the

84. *Grand Int'l Brotherhood v. Green*, 210 Ala 496 98 S 569 (1923); *Brotherhood v. Williams*, 211 Ky 638, 277 SW 500 (1925); *Crutcher v. Eastern Division*, 151 Mo App 622, 132 SW 307 (1910); *Austin v. Dutcher*, 56 AD 393, 67 NYS 819 (1900); *Carry v. Int'l Brotherhood*, 123 Misc 680, 206 NYS 73 (1924); *Bennett v. Kearns*, 86 A 660 (RI 1913); *Screwmen's Benevolent Assn v. Benson*, 76 Tex 552, 13 SW 379 (1890); *Pratt v. Amalgamated Assn* 50 Utah 472, 167 P 830 (1917); *Strvors v. Blethen*, 124 Wash 473, 215 P 7 (1923).

In Maryland, the courts have gone so far as to say that judicial intrusion upon the internal affairs of associations will only take place in cases involving fraud. *Donnelly v. Supreme Council*, 106 Md 425, 67 A 276, 124 Am St Rep 490 (1907).

85. *Local Union v. Nalty*, 7 F(2d) 100 (CCA 6, 1925); *Local Union v.*

United Brotherhood, 143 La 901, 79 S 532 (1918); *Schouten v. Alpine*, 77 Misc 19, 137 NYS 380 (1913), *aff'd on condition* in 155 AD 922(d), 140 NYS 1144, *rev'd* 215 NY 225, 109 NE 244 (1915).

86. *Baltimore Lodge v. Grand Lodge*, 134 Md 355, 106 A 692 (1919); *Dolan v. Court of Good Samaritan*, 123 Mass 437 (1880); *Bricklayers' Union v. Bowen*, 183 NYS 855 (1920), *aff'd w. o. p.* in 198 AD 967(b), 189 NYS 837 (1921); *Screwmen's Benevolent Assn. v. Benson*, 76 Tex 552, 13 SW 379 (1890); *Burger v. McCarthy*, 84 W Va 697, 100 SE 492 (1919); *Knuth v. Lepp*, 180 Wis 529, 193 NW 519 (1923). *c/f* *Lo Branco v. Cushing*, 115 NJ Eq 556, 171 A 778 (1934). The question as to whether members may bind themselves to accept as conclusive the determinations of the association, and not to appeal to the courts, has been answered in the affirmative in

courts to make and construe and interpret the meaning and effect of the constitution, rules or by-laws," unless the result of such interpretation is absurdity," or the creation of new constitutional provisions, rules or by-laws." It has even been held that an association may properly provide in its constitution or by-laws that the decisions of the association in connection therewith shall be final and conclusive, and shall preclude resort to the courts.⁸⁰ By-laws which prohibit teaching apprentices the trade without the union's prior permission, or which restrict the number of apprentices have been upheld.⁸¹ While it is stated in a number of cases that exhaustion of internal remedies is not necessary where such remedies are unduly cumbersome or patently vain,⁸² it has been held that a delay of one year in the meet-

Road v. Rwy. Pass. etc Assn 31 F 62 (CCND Ill 1887); *Harris v. Detroit Typo. Union*, 144 Mich 422, 108 NW 362 (1906), and in the negative in *Supreme Council v. Forsinger*, 125 Ind 52, 26 NE 129, 9 LRA 501, 21 Am St Rep 196 (1890); *Van Poucke v. Netherland St. Vincent De Paul Soc* 63 Mich 378, 29 NE 863 (1886); *Austin v. Searing*, 16 NY 112, 69 Am Dec 665 (1857). Accord. Rest., Torts (1939) Sec 811.

An action for damages for wrongful expulsion may be brought without exhausting the internal remedies of the association, because even a reversal by the appellate tribunal within the association will not secure to the expelled member the damages to which he is entitled by reason of the wrongful expulsion. *Local Union v. Nalty*, 7 F(2d) 100 (CCA 6, 1925); *Grand Int'l Brotherhood v. Green*, 210 Ala 496, 98 S 569 (1923); *St. Louis Southwestern R. Co. v. Thompson*, 102 Tex 89, 113 SW 144, 19 Ann Cas 1250 (1908); *Thompson v. Grand Int'l Brotherhood*, 41 Tex Civ App 176, 91 SW 834 (1906). *cf* Rest., Torts (1939), Sec 811.

87. *Shaup v. Grand Int'l Brotherhood*, 223 Ala 202, 135 S 327 (1931); *Pratt v. Amalgamated Assn* 50 Utah 472, 167 P 830 (1917); *Simpson v. Grand Int'l Brotherhood* 83 W Va 355, 98 SE 580 (1919).

88. See *Simpson v. Grand Int'l Brotherhood*, 83 W Va 355, 98 SE 580 (1919).

89. See *Shaup v. Grand Int'l Brotherhood*, 223 Ala 202, 135 S 327 (1931); *Pratt v. Amalgamated Assn* 50 Utah 472, 167 P 830 (1917); *Simpson v. Grand Int'l Brotherhood*, 83 W Va 355, 98 SE 580 (1919).

90. *Brotherhood of R. Trainmen v. Barnhill*, 214 Ala 565, 106 S 456 (1926); *Black & White-Smiths' Soc. v. Vandyke*, 2 Whart 309, 30 Am Dec 263 (1837). *Contra* *Van Poucke v. Netherland St. Vincent De Paul Soc.* 63 Mich 378, 29 NW 863 (1886).

91. *Snow v. Wheeler*, 113 Mass 179 (1873); *Parker v. Bricklayers' Union*, 10 Ohio Dec Rep 458 (1889); *Longshore Printing Co. v. Howell*, 26 Or 527, 38 P 547, 28 LRA 464, 46 Am St Rep 640 (1894).

92. *Otto v. Journeymen Tailors' Protective & Benev. Union*, 75 Cal 308, 17 P 217, 7 Am St Rep 156

ing time of an appellate body is insufficient to excuse recourse to such body before resort is had to the courts.⁹³

One who has been wrongfully expelled may, to be sure, obtain legal redress, where he has unsuccessfully exhausted his remedies within the association, either by an action for damages,⁹⁴ or by an application for reinstatement, whether by mandamus (where the association is a corporation),⁹⁵ or by a suit in equity (where the association is unincorporated).⁹⁶ The right of a labor union to discipline its members is unquestioned, provided only (1) that the con-

(1888); *Malloy v. Carroll*, 272 Mass 324, 172 NE 790 (1930); *Hall v. Morrin*, 293 SW 435 (Mo App 1927); *Rodier v. Huddell*, 232 AD 531, 250 NYS 336 (1931).

93. *Snay v. Lovely*, 176 NE 791 (Mass 1931).

94. *Campbell v. Johnson*, 167 F 102, 92 CCA 554 (CCA 9, 1909); *Lahiff v. St. Joseph's Society*, 76 Conn 648, 57 A 692 (1904); *Swafford v. Kanton*, 23 Ga App 238, 98 SE 122 (1919); *Eachman v. Huebner*, 228 Ill App 537 (1922); *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 NY 101, 23 NE 129 (1889); *Simons v. Berry*, 240 NY 463, 148 NE 636 (1925); *Polin v. Kaplan*, 257 NY 277, 177 NE 833 (1931); *Blek v. Wilson*, 262 NY 253, 186 NE 692 (1933); *Cotton Jammers Assn. v. Taylor*, 23 Tex Civ App 367, 56 SW 553 (1900); *Thompson v. Grand Int'l Brotherhood*, 41 Tex Civ App 176, 91 SW 734 (1905); *Simpson v. Grand Int'l Brotherhood*, 83 W Va 355, 98 SE 580 (1919), cert. den. 250 US 644, 39 S Ct 494, 63 L Ed 1186 (1919). See also *Malmsted v. Minneapolis Aerie*, 111 Minn 110, 126 NW 486 (1910). Note supra, however, that one who has been wrongfully expelled may sue for damages without exhausting the internal machinery of the association. A wrongfully expelled member may not recover expense of legal services in-

curred to procure reinstatement. *Polin v. Kaplan*, 257 NY 277, 177 NE 833 (1931). Damages may be recovered to the extent of the amount which the wrongfully expelled union member would have earned if in possession of a union card, but there must be evidence from which it may be inferred that the plaintiff would have, but for the expulsion, been employed. *Blek v. Wilson*, 262 NY 253, 186 NE 692 (1933).

95. *Burke v. Monumental Division*, 273 F 707 (DCD Md 1919); *Medical & Surgical Soc. v. Weatherby*, 75 Ala 248 (1883); *Meurer v. Detroit Musicians Benev Assn.* 95 Mich 451, 54 NW 954 (1893); *Lysaght v. St. Louis Op. Stonemasons' Assn.* 55 Mo App 538 (1893); *O'Brien v. Musical Mut. Pro. & Benev. U.* 64 NJ Eq 525, 54 A 150 (1903); *People ex rel. Deverell v. Musical Mut. Protective Union*, 118 NY 101, 23 NE 129 (1889); *Black & Whitesmiths' Soc. v. Van Dyke*, 2 Whart 309 (Pennsylvania), 30 Am Dec 263 (1837); *Screwmen's Benevolent Assn. v. Benson*, 76 Tex 532, 13 SW 379 (1890).

96. *Burke v. Monumental Division*, 286 F 949 (DCD Md 1922) aff'd w.o.p. 298 F 1019(d) (CCA 4, 1924); *Holmes v. Brown*, 146 Ga 402, 91 SE 409 (1917); *Jersey City Printing Co. v. Cassidy*, 63 NJ Eq 756, 53 A 230 (1902); *Simons v. Berry*, 240 NY 463, 148 NE 636 (1925).

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stitution and by-laws of the association are followed;" (2) that the discipline is undertaken and executed in good faith," and (3) that the disciplined member is afforded an opportunity to be heard, and otherwise accorded the benefit of procedure commonly included in the notion of due process.⁹⁷ In some cases, however, courts go further, to require that the determination of the association accord with "natural justice."¹ "Except as otherwise provided in the constitution and by-laws a member of a union has no more right than a nonmember to complain of hardship

97. *Hatch v. Grand Lodge*, 233 Ill App 495 (1924); *Brennan v. United Hatters*, 73 NJL 749, 65 A 165, 9 LRA(NS) 254, 118 Am St Rep 727, 9 Ann Cas 698 (1906); *Blanchard v. Newark Joint Dist Council*, 77 NJL 389, 71 A 1131 (1909); *People ex rel. Deverell v. Musical Mut Pro Union*, 118 NY 101, 23 NE 129 (1889).

98. *Campbell v. Johnson*, 167 F 102, 92 CCA 554 (CCA 9, 1909); *Otto v. Journeymen Tailors' Pro. & Benev. Union*, 75 Cal 308, 17 P 217, 7 Am St Rep 156 (1888); *Eschman v. Huebner*, 226 Ill App 537 (1922); *Brennan v. United Hatters*, 73 NJL 749, 65 A 165, 9 LRA(NS) 254, 118 Am St Rep 727, 9 Ann Cas 698 (1906); *Lo Branco v. Cushing*, 115 NJ Eq 558, 171 A 778 (1935); *Gilmore v. Palmer*, 109 Misc 552, 179 NYS 1 (1919); *St. Louis, etc R. Co. v. Thompson*, 192 SW 1095 (Tex Civ App 1917).

99. *Grand Grov. v. Garibaldi Grove*, 130 Cal 116, 62 P 486, 80 Am St Rep 80 (1900); *Gardner v. Newbert*, 74 Ind App 183, 128 NE 704 (1920); *Lysaght v. St. Louis Op Stonemason's Assn.* 55 Mo App 538 (1893); *State, Zeff, Prosecutor v. Grand Lodge*, 53 NJL 536, 22 A 63 (1891); *Ostrom v. Greene*, 161 NY 353, 55 NE 919 (1900); *Cotton Jamers & Longshoreman's Assn. v. Taylor*, 23 Tex Civ App 367, 56 SW 553 (1909); *Pratt v. Amalgamated*

Assn. 50 Utah 472, 167 P 830 (1917). A member cannot be charged with one offense and tried for a different offense. *Everson v. Order of Eastern Star*, 265 NY 112, 191 NE 854 (1934).

1. But no general clue, aside from the holdings of specific cases, can be given to the meaning of the words "natural justice." It has been held, in applying the requirement of "natural justice," that a member cannot be expelled because he exercised his right to sue the union. *Sweetman v. Barrows*, 263 Mass 349, 161 NE 272 (1928). It has also been held that a member is wrongly expelled where the reason therefor is that he testified against the interest of the union. *Thompson v. Grand Int'l Brotherhood*, 41 Tex Civ App 170, 91 SW 834 (1905). *c/f Choate v. Logun*, 240 Mass 131, 133 NE 582 (1921). One who signed a petition to the state legislature was held to have been improperly expelled because of the absence of "natural justice," although a union by law provided against members using their influence against the legislative representation of the union. *Spayd v. Ringing Rock Lodge*, 270 Pa 67, 113 A 70, 14 ALR 1446 (1921). See *Schneider v. Local Union*, 116 La 270, 40 S 700 (1904). See also *Grand Int'l Brotherhood v. Green*, 210 Ala 496, 98 S 569 (1923).

caused to him by a union acting lawfully.”² It has been held that an employee who has lost his employment in consequence of the adoption of a union rule directing that all employees, in shops wherein the employers pay to their employees less wages than that provided for in a collective bargaining agreement, be removed from such shops for a period of one year, cannot complain that he has been deprived of membership rights without proper trial, since the right to retain a job is not a membership right.³

Even without any authorizing constitutional provisions or by-law, a member may be expelled “for such conduct as clearly violates the fundamental objects of the association, and if persisted in and allowed would thwart those objects or bring the association into disrepute,”⁴ because “in every contract of association there inheres a term binding members to loyal support of the society in the attainment of its proper purposes, and that for a gross breach of this obligation the power of expulsion is impliedly conferred upon the association.”⁵

Underlying the entire law governing the internal affairs of trade unions is the conception that if the union be a corporation it must be treated like any other corporation, while if it is an unincorporated association it must likewise be treated like any other unincorporated club or association, such as a church or social organization. Labor unions are thus permitted to exclude competent workingmen from their ranks because other associations have the like right. There is as yet no body of law governing trade unions different from that governing any other organizations or associations; there are simply cases applying the general rules

2. *O’Keefe v. Local 463, United Assn. of Plumbers and Gasfitters*, 277 NY 300, 308, 14 NE(2d) 77, 80, 117 ALR 817 (1938).

3. *O’Keefe v. Local 463, United Assn. of Plumbers and Gasfitters*, 277 NY 300, 14 NE (2d) 77, 117 ALR 817 (1938). *c/f Pierce v. Louisville, etc. R. Co.* 198 Ky 477, 248 SW 1042, 33 ALR 322 (1923).

4. *Otto v. Journeymen Tailors’ Protective & Benev. Union*, 75 Cal 308, 314, 17 P 217, 219, 7 Am St Rep 156 (1888). See also *Weiss v. Musical Mut. Pro. Union*, 189 Pa 446, 451, 42 A 118, 120, 69 Am St Rep 820 (1899).

5. *Polin v. Kaplan*, 257 NY 277, 177 NE 833 (1931).

governing such organizations or associations to trade unions. In qualifying the right of a labor union to exclude whomsoever it will from membership, the few cases, the Pennsylvania State Labor Relations Act, the Wisconsin Employment Peace Act, and the Restatement of Torts, seek to build up a new body of law. There is, to be sure, social basis for the attempt. Moreover, "when an association has a strangle-hold upon an industry or occupation, internal decisions upon other questions besides expulsion and admission may be of much public concern."⁶

In *Heim v. Screen Actors Guild*,⁷ the by-laws of the union divided the members into two groups; one group was forbidden, without the prior approval of the other, to engage in collective bargaining or to strike. The action was brought by a member of the powerless group to set aside the by-law as void because conflicting with public policy, and especially with the guarantees contained in the National Labor Relations Act. The court held for the plaintiff. "Acts of Congress," reasoned the court, "are by the constitution made a part of the supreme law of the land. Hence the conclusion is inescapable that those by-laws of the Guild which enforce the surrender by the extras of their right to strike must be held ineffectual and void as violative of Federal law," to wit, the National Labor Relations Act, which declares a non-intention of interfering with the right to strike, and announces a guarantee to employees of their right to bargain collectively. The union made the argument that "a dissatisfied member may drop out," to which the Court replied "That is generally, if not always, true in labor organizations. But in an industry which is 95 per cent closed shop, the consolation afforded by that privilege is dubious."

The usual closed shop collective bargaining agreement

6. Chafee, *The Internal Affairs of Associations Not for Profit* (1930), 43 *Harv L Rev* 993, 1023. c/f Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916), 29 *Harv L Rev* 640, 677, at p 680, where it is stated that it is "neither intrinsically desirable nor expedient

from the standpoint of dispatch of public business in the courts" for a court of equity "to be the final interpreter of the laws and rules of all voluntary associations, clubs, and fraternal orders."

7. 8 IJA Bull 65 (*Superior Ct. Los Angeles Co.* (1940)).

contains a provision that an employer shall employ and retain in his employ only members of the union in good standing. There appears to be no legal theory, in the absence of contractual provision to the contrary, whereby an employer can question the expulsion of a competent employee in consequence of which the employer is obliged under the agreement to discharge him. This may in the given instance cause great harm to the business or production of the employer, especially in a case where the expelled employee is a skilled workman whose skill is the result of long training in the employer's plant. To avoid such a situation, it would be well to insert in the closed shop collective bargaining agreement a provision giving the employer the right to contest the basis of the employee's expulsion. Such a provision would read as follows: "Should the good standing of an employee as a member of the union cease at any time during the life of this agreement or any renewal thereof, the employer shall, at the written request of the union, discharge such employee; the employee, however, shall have the right to reinstatement upon payment of all unpaid dues and other obligations; should the employer deem the request of the union to discharge such employee as unjustified, or should the employer deem the expulsion of such employee from the union as unjustified, the dispute shall be submitted to arbitration." The agreement should also provide for the manner of arbitration, and it might be well to provide that the arbitrator may not decide the question generally, but must make findings of fact upon which the decision is based.

Section 101. Strike for Closed Shop—Effect of Employer's Right to Choose Employees from the Open Market.

Another method of dealing with the problem is that of permitting the employer to choose employees from the open market with the proviso that they become members of the given union after a trial period. But here too labor's objections remain to be contended with. Employees, says labor, would thereby develop a loyalty directed primarily toward the employer and not toward the union. This, it is

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asserted, would be the natural consequence of a situation wherein the employee owes his employment not to the union but to the employer. The consequence would be that the union would find it difficult to enforce its rules governing the terms and conditions of employment. Evasion of union regulations would take the form of secret overtime working, espionage upon other employees and failure or refusal to join in strikes and other labor activities. In *Miller v. Rnehl*,² wherein the court denied an employee's application to compel membership in a labor union against the union's will upon the ground that the general rule holds against the employee in such cases, it was said that "the basis of such holding has been that if the union which was a voluntary association organized for the good of those taken into membership and for those *in industry who would be eligible for membership*, could be compelled to accept members, then persons whose interests were inimical to the union and its purposes could force themselves into membership in the union and from within destroy the union and thus sterilize the purposes for which the union was organized." Trade-unionism, say the leaders of labor, means something more than a movement inspired by a dues-paying membership. It means, rather, a different perception of the workers' lot, a feeling of general participation in union problems and union objectives. It means too that unionism bears a heavy responsibility toward society to develop means for the preservation of industrial peace while at the same time developing new techniques for the achieving of social justice. Finally, it involves the notion of seniority rights which labor contends are the responsibility of the labor union and not the employer. All these, then are the tasks of trade-unionism, in the accomplishment of which industry and the public have a stake equally as important as that of trade union members. Until such time as labor is convinced of American employers' general willingness to accept unionism and the responsibilities which it offers to assume

² 100 Misc 479, 2 NYS(2d) 304 (1938).

toward employers, and American employers are convinced of labor's emphasis upon cooperation, mutual suspicions will prevent solution of this important problem.

Section 102. Strikes in Cooperation with, or for the Benefit of, Employers' Associations.

The closed shop contract which the strike seeks to compel and which has been discussed in preceding sections, must be understood to be a contract under the terms of which the employer covenants to employ under stipulated conditions none but members of a given labor union. The opposite covenant, that is, a covenant by a labor union to work for none but members of a given employers' association, though sometimes found in closed shop contracts, is not strictly one for a closed shop as generally understood. Such a covenant, or strike or picketing in enforcement thereof, has been condemned almost everywhere,⁹ including jurisdictions holding the closed shop or the strike therefor valid.¹⁰ A moment's reflections will reveal the distinc-

8. *Overland Pub. Co. v. Union Lithograph Co.* 57 Cal App 366, 207 P 412 (1922); *Employing Printers Club v. Doctor Blosser Co.* 122 Ga 509, 50 SE 353 (1905) and see *Reynolds v. Davis*, 198 Mass 294, 84 NE 457 (1908); *Long v. Larkin* (1914) 2 Ir R 283, aff'd in (1915) AC 814, Ann Cas 1915D 509. *Contra*: *Sheehan v. Levy*, 238 SW 900 (Texas 1922); *In Belf v. United States*, 259 F 822, 170 CCA 622 (CCA 3, 1919) an agreement between an employers' association and a labor union, under the terms of which the union agreed, among other things, to work for none but members of the association was held to constitute a criminal conspiracy under the Sherman Anti-Trust Act. See also *Converse v. Highway Construction Co.* 107 F(2d) 127 (CCA 8, 1939).

10. *Overland Pub. Co. v. Union Lithograph Co.* 57 Cal App 366, 207 P 412 (1922); *Campbell v. People*,

72 Colo 213, 210 P 841 (1922); *Coons v. Christie*, 24 Misc 296, 53 NYS 608 (1898); *Brescia Const. Co. v. Stone Masons Con-Str. Ass'n* 195 AD 647, 187 NYS 77 (1921). In *American Fur Mfrs Assn v. Ass. Fur Mfrs* 161 Misc 246, 291 NYS 610 (1936), aff'd 251 AD 708, 296 NYS 1000 (1937), the *Brescia* case was disapproved as having been decided prior to the enactment in 1933 of the Amendment to the State Anti-Trust Act known as the *Donnelly Act*, which amendment, having exempted labor organizations from the operation of the Anti-Trust law, permitted closed shop agreements and labor activity in aid thereof, of the kind condemned in the *Brescia* Case. In a later case, however, *Falciglia v. Gallagher*, 164 Misc 838, 299 NYS 890 (1937) aff'd 251 AD 708 (Mem. 1937), the *Brescia* Case was followed and the *American Fur Mfrs.* Case "distinguished" and

tion. The strike for the closed shop seeks to compel the establishment of a uniform rule governing employees, not employers. It is generally of no consequence to employees that a given employer is or is not a member of an employers' group, provided he maintains union standards. The only purpose and effect of a covenant to work for none but members of an employers' association or a strike to compel enforcement of such a covenant would be to secure to the particular employers parties to the covenant a monopoly in the given industry without social justification. It has accordingly been held that unions may not legally combine to prevent employers from becoming members of an employers' association.¹¹

The strike to enforce the condemned covenant considered above must be distinguished, on the other hand, from one to compel the employer struck against to abide by the terms of a collective bargaining agreement, even though the employer is not a party thereto. The case of *Abeles v. Friedman*¹² illustrates such a situation. There it appeared that a collective bargaining agreement existed in the garment industry, under the terms of which jobbers were made responsible for the labor conditions of their contractors. The plaintiff jobber refused to become a party to the agreement, and refused also to assume responsibility for the terms and conditions under which his contractor was employed. The union thereupon called a strike among the contractor's employees, and commenced to picket the jobber's premises.

disapproved notwithstanding the Donnelly Act. See also *De Vero v. Gene Louis, Inc.* 104 NYLJ 37 (1940). In *Weitzberg v. Dubinsky*, 173 Misc 350, 18 NYS(2d) 97 (1940), *aff'd* 21 NYS(2d) 512 (1940) the court held legal and unenjoinable a strike designed to compel the plaintiffs to resign from one association and again to become members of another association from which they had theretofore resigned. The court cited the *American Fur Mfrs. Ass'n Case* (supra) with approval but

failed to cite *Falciglia v. Gallagher* (supra). See also *Beckerman v. Bakery & Confectionery Workers Union*, 28 ONP(NS) 550 (1931) where a strike to eject certain employers from an employers' association upon the ground that they operated non-union shops was held bad.

11. *Parker Paint and Wall Paper Co. v. Local Union*, 87 W Va 631, 105 SE 911 (1921).

12. 171 Misc 1042, 14 NYS(2d) 252 (1939).

The main point decided by the case is that the picketing was permissible, even though the jobber employed nobody in connection with his jobbing, the Court holding that through custom and usage and as codified by a collective bargaining agreement in the industry, the jobber was so associated with his contractor as in contemplation of labor relations to be an employer of the latter's employees. The court indicated, however, that the strike was perfectly proper, being one to compel compliance with labor standards fixed by a collective bargaining agreement.

It is to be noted that the view appears to be gaining ground in the cases that labor activity is legal even though activated by a desire to compel an employer to become a member of an employers' association, upon the theory that uniformity of conditions throughout the industry and more convenient and effective disciplinary machinery for the enforcement of provisions contained in collective bargaining agreements may the better be achieved through bargaining by a single labor union with a single employers' association.¹³ Emergence of this view is so new that its limitations are as yet incapable of precise ascertainment. The Restatement, cognizant of the extent to which the possibility of collective negotiations between a single employees' unit and a single employers' association may be an aid to collective bargaining, states the rule (Sec. 793) that "an employer's consenting to become, remain or cease to be a member of an association of employers is not a proper object of concerted action by workers when they do not reasonably believe that his membership or non-membership in the association will aid a collective interest of the workers." In a caveat it is stated that "the Institute takes no position as to the propriety of the objects stated in this Section when the workers do reasonably believe that the employer's membership or non-membership in the association will aid a collective interest of the workers."

The present state of the law governing the situation dis-

13. See cases *supra*, this section. further discussion of the development
See also *infra*, sections 174, 175 for a of this notion.

cussed in this section is in a condition of uncertainty. Indeed, even cases which hold in general terms that a strike to compel an employer to join an employers' association is legal, equivocate in connection with the problem as to whether such a strike would be legal upon a showing that the employer is willing to sign the same collective bargaining contract as that existing between the union and the employers' association. Thus in *Sheehan v. Levy*,¹⁴ where a strike was held legal though apparently called to compel an employer to join up with an employers' association, the court stated: "We are not prepared to say that the withdrawal of the men could have been justified had Sheehan tendered them a contract containing the 21 sections which are included in the working agreement entered into July 22, 1918, between the Local Union in question and the Master Plumbers' Association. If the members of the Local Union could have gotten exactly the same contract with Sheehan that the Master Plumbers offered them, we doubt if they would have had the right to quit working for him just because he would not join the association."

Section 103. The Secondary Strike.

A secondary strike may perhaps best be defined as a coercive measure adopted by workers against an employer connected by product or employment with alleged unfair labor conditions or practices.¹⁵ It is this connection of product or employment with the primary labor dispute which serves to distinguish the secondary strike from the sympathetic strike. The distinction is in no sense a legalism. *A secondary as distinguished from a sympathetic relationship is deemed to exist where employees would be called upon to cooperate with allegedly unfair employers or to assist in the manufacture or sale of their products.* Sympathetic labor activity is void of any such circumstance. The language used by the court in *Levering & Gar-*

14. 238 SW 900 (Texas Comm. of Appeals, 1922).

15. See *infra*, section 122, for the distinction between the secondary strike, and secondary picketing and boycotting.

rigues v. Morrin,¹⁶ which held what will be seen to be a secondary strike unenjoinable because constituting a "labor dispute" as defined by the Norris Act, reveals the failure by the judiciary to grasp the distinction between the secondary and the sympathetic strike: "The court has not the power or authority to issue an injunction against those appellants who are engaged in a controversy arising out of an attempt to establish a closed shop by notifying general contractors and architects of an intention of members of a union to refuse to work, nor can these appellees prevent these appellants from refusing to work or inciting sympathetic strikes." The factual pattern disclosed in the quoted material indicates clearly a secondary strike. The concluding words "sympathetic strike" is a non-sequitur; the strikers were refusing to assist or cooperate with, by extending, the primary industrial dispute.

The Restatement of Torts, while drawing a distinction between refusal to work on non-union goods (Section 802) and a strike "against an employer who uses in his business, goods or services produced by, or furnishes goods or services to or on behalf of, a third person whose employees are engaged in a labor dispute. . . ." (Section 803) holds that a common factor necessary to exist as a condition to the lawfulness of the refusal to work or of the strike, is the fact that "the actors have a substantial interest in the third persons' employment relationship." Given no such "substantial interest" the refusal to work or the strike is illegal. In Section 804 the factors which determine the existence of a substantial interest are tabulated as (1) similarity of work; (2) relationship of strikers and the employees involved in the primary dispute; (3) relation of their employers; (4) the size and integration of the respective communities; (5) the form of the labor unions; (6) their competitive status. In Section 805, on the other hand, it is stated that "employees who in concert refuse to work on a job on which is engaged also a third person whose em-

16. 71 F(2d) 284, 287 (CCA 2, 1934) cert. den. 293 US 595, 55 S Ct 110, 79 L Ed 698 (1934).

ployees are not members of a labor union satisfactory to the actors or are engaged in a labor dispute with him for a proper object are not liable to their employer or to the third person for harm caused thereby." In other words, a secondary strike called in protest against further working along with non-union employees is legal even though there is no "substantial interest" such as is necessary to legalize a strike or a refusal to work on goods manufactured, received or sold under non-union conditions. It is submitted that there is no basis for the distinction. All three cases are cases of secondary strike. In all three cases there is a connection of product or employer. It is this connection which, as above stated, distinguishes the secondary strike from a sympathetic strike or a general strike. The necessity for a "substantial interest" is explained by the Restatement with the words "the rule does not go the full length of recognizing the class solidarity of workmen as a justification." The secondary strike never calls upon class solidarity as the justifying feature. It calls rather upon the connection of product or employment. Secondary strikers simply say "we refuse to work with non-union workmen, or to lay hands on non-union goods or actively to cooperate with material to be shipped to non-union plants." A subtlety which underlies American judicial labor decisions is the insistence that controversies should be localized. Probably upon this ground more than upon any other of the grounds expressly set forth in the decisions, picketing in the absence of a strike, secondary picketing or secondary boycotting are almost uniformly held illegal, and we shall probably never see the time when a sympathetic or general strike shall have received the favor of a judicial decision. But in discussing secondary strikes there is no need to seek a justifying feature in contradiction to the subtlety of which mention has been made. The connection of product or employment is sufficient anchor to localize the ambit of the employment of the secondary strike.

Further illumination of the precise characteristics possessed by the secondary strike will result from an analysis

of the difficulty which courts find in holding it legal, as against labor's opposite contention. Courts have proceeded upon the theory that an innocent and presumably disinterested third party C ought not to suffer because of a labor dispute existing between A and B. C, it is said, ought not to be used as a lever to coerce the employer involved in the primary labor dispute. Labor, it seems, has been as yet generally unsuccessfully trying to impress upon the courts the fact that C is not a neutral, but rather the beneficiary of allegedly unfair labor conditions.

From another viewpoint, a strike which is not primary is necessarily a sympathetic strike; both secondary and general strikes are sympathetic in the sense that only the primary strike is concerned directly with the situation of the workers on strike. The secondary strike, however, will be seen to be qualitatively and not merely quantitatively different from the sympathetic strike in containing an element of proximity with the strikers' immediate welfare; a business connection exists between the unfair employer and the employer struck against. Where no such connection exists, the strike may properly or at least technically be defined as a sympathetic strike. (A general strike is nothing more than a widespread sympathetic strike which substantially affects the economic life of the given community. Many secondary strikes would be converted into primary strikes for the closed shop by industrial as distinguished from craft unionism. Thus a strike by workers on bodies of automobiles upon the ground that the motors connected with the bodies have been manufactured by non-union labor would be a secondary strike if independent unions were involved, whereas such a strike would merely be one for the closed shop if one industrial union controlled the entire automobile industry. It can readily be realized especially in view of the judicial hostility in many quarters of the United States to the secondary strike (as will hereafter be seen in this section) that here exists a significant explanation and a partial reason for the rise of industrial unionism.

The secondary strike has been differently classified. Mr.

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Lien, in a volume concerned mainly with the National Labor Relations Act,¹⁷ distinguishes between (1) strikes in protest against the use of non-union materials in the same or related crafts, and (2) strikes against the intermediate employer because of the presence of non-union contractors on the job, while Mr. Hellerstein, in a carefully written paper,¹⁸ adds still a third: strikes against intermediate employers by workers in unrelated crafts. There is reason to object to such classification for any purpose other than that of mere present description. The better course, it is submitted, is to indicate the underlying rationale which determines the secondary as distinguished from the sympathetic nature of the given strike, rather than to subject the secondary strike to the tangential approach of artificial classification. Given the connection of product or employment and the circumstance that the strikers, if enjoined from striking, would thereby be coerced into actively assisting the primary unfair labor practice, the case presents a secondary strike. The inappropriateness of any classification other than for descriptive purpose is further illustrated by the circumstance that a strike may be secondary, without having relation to any of the suggested classifications. Thus a strike by finishers in protest over the fact that their fellow employees had been discharged by their employer because of the introduction of labor saving machinery would be a secondary strike;¹⁹ to enjoin such a strike would thereby coerce the strikers into assisting affirmatively extension of the alleged primary unfair labor practice.

Eighteen states have thus far most directly passed on the validity of the secondary strike. These are Illinois, Maryland, Massachusetts, Michigan, Missouri, New Jersey, Ohio, Pennsylvania, Virginia, Washington, Arkansas, Cal-

17. Lien, *Labor Law and Relations* (1938).

18. Hellerstein, *Secondary Boycotts in Labor Disputes* (1938), 47 *Yale LJ* 241.

19. *C. B. Rutan Co. v. Local Union*, 67 *NJ Eq* 77, 128 *A* 522 (1925)

where such a strike was held legal. *Contra: Weilinsky v. Hillman*, 185 *NYS* 287 (1920). See *supra*, section 89 for a general discussion of strikes called to protest the discharge of employees because of the use of labor saving devices.

ifornia, Connecticut, Florida, Iowa, Minnesota, New York and North Carolina. The latter eight states have held legal the secondary strike (where it otherwise is carried on for a lawful purpose),²⁰ while the former ten states have outlawed it.²¹ "Organized labor's right of coercion and com-

20. *Arkansas*.—*Meier v. Speer*, 96 Ark 618, 132 SW 988 (1910).

California. — *Parkinson v. Bldg Trades Council*, 154 Cal 581, 98 P 1027 (1908).

Connecticut. — *Cohn & Roth v. Bricklayers Union*, 92 Conn 161, 101 A 659 (1917).

Florida.—*Jetton Delke Lumber Co. v. Mather*, 53 Fla 969, 43 S 590.

Iowa.—*Smythe Neon Sign Co. v. Local No. 405*, 284 NW 126 (Iowa 1939).

Minnesota.—*Grant Const. Co. v. St. Paul Bldg. Trades Council*, 136 Minn 167, 161 NW 520.

New York.—*Wilson & Adams Co. v. Pearce*, 135 Misc 426, 237 NYS 601, 240 AD 718, 265 NYS 624, *aff'd* 264 NY 521, 191 NE 545 (1930); *Bossert v. Dhuy*, 221 NY 342, 117 NE 542, *Ann Cas* 1918D, 661 (1917); *Auburn Draying Co. v. Wardell*, 227 NY 1, 124 NE 97, 6 ALR 901 (1919) (except where employed in connection with a secondary boycott). See also *Reardon, Inc. v. Caton*, 189 AD 501, 178 NYS 713 (1919); *Opera on Tour v. Weber*, 258 AD 516, 17 NYS(2d) 144 (1940). The New York law seems to be that secondary strikes are valid but only if limited to a single industry. It is not clear, however, what is meant by a single industry. In the *Wilson Case* (*supra*) the Court of Appeals affirmed the holdings of the courts below without opinion, but the language of the Appellate Division indicates the precise holding in the case: "The primary purpose of the defendants (Brotherhood of Teamsters, etc.) was but to induce the employment of union

teamsters, chauffeurs and helpers in the transportation of materials and supplies for use in the erection of buildings upon which union men were employed. Loading in the supply yards and unloading at the points of construction are included in the term 'transportation' and the trial court correctly found that such work was a necessary part of the construction." See also *N. Y. Lumber Trade Ass'n v. Lacey*, 245 AD 262, 281 NYS 647 (1935), *aff'd w. o. op.* 269 NY 597, 199 NE 688 (1935) *remititur am.* in 269 NY 677, 200 NE 54 (1936) *cert. den.* 298 US 684 56 S Ct 954, 80 L. Ed 1404 (1936).

North Carolina.—*State v. Van Pelt*, 136 NC 633, 49 SE 177 (1904).

See also *Aeolian Co. v. Fisher*, 27 F(2d) 560 (DC SD NY 1928); 29 F(2d) 679 (CCA 2, 1928), 35 F(2d) 54 (DC SD NY 1929).

21. *Illinois*.—*Purington v. Hinchcliff*, 219 Ill 159, 76 NE 47 (1905). *Anderson & Lind Mfg. Co. v. Carpenters Dist. Co.* 308 Ill 488, 139 NE 887 (1923); *Wilson v. Hey*, 232 Ill 389, 83 NE 928 (1908).

Maryland.—*Bricklayers Union v. Ruff*, 160 Md 483, 154 A 52, 83 ALR 448 (1931); *Blandford v. Duthie*, 147 Md 388, 128 A 139 (1925).

Massachusetts.—*New England Cement Gun Co. v. McGivern*, 218 Mass 198, 105 NE 885 (1914); *Steam Lumber Co. v. Howlett*, 200 Mass 45, 157 NE 84 (1927); *Burnham v. Dowd*, 217 Mass 351, 194 NE 841 (1914); *Snow Iron Works v. Chadwick*, 227 Mass. 382 (1917); *Pickett v. Walsh*, 192 Mass 587, 78 NE 753,

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pulsion," it is said in explanation of the rule outlawing the secondary strike, "is limited to strikes on persons with whom the organization has a trade dispute. . . ." ²² In *Pickett v. Walsh*,²³ the court thus stated its reason for holding the secondary strike unlawful: "A strike on A, with whom the striker has no trade dispute, to compel A to force B to yield to the striker's demands, is an unjustifiable interference with the right of A to pursue his calling as he

6 LRA(NS) 1067, 116 Am St Rep 272, 7 Ann Cas 638 (1906); *Service Woodheel Co. v. Mackesy*, 199 NE 400 (Mass); *Armstrong Cork & Insulator Co. v. Walsh*, 276 Mass 263, 177 NE 2 (1931).

Michigan.—*Beck v. Rwy. Teamsters Union*, 118 Mich 497, 77 NW 13, 42 LRA 407, 74 Am St Rep 421 (1898).

Missouri.—*Lohse Patent Door Co. v. Fuelle*, 215 Mo 421, 114 SW 997, 22 LRA(NS) 607, 128 Am St Rep 492 (1908).

New Jersey.—*Booth & Bros v Burgess*, 82 NJ Eq 181, 65 A 226 (1900).

Ohio. — *Moore v. Bricklayers Union*, 10 Ohio Dec 645 (1889).

Pennsylvania.—*Purvis v. Local No. 500*, 214 P 348, 63 A 585 (1906); *United Brotherhood of Carpenters & Joiners*, 274 Pa St 348, 63 A 585 (1906).

Virginia.—*Crumps Case*, 84 Va 927, 6 SE 680 (1888).

Washington.—*Pacific Typesetting Co. v. Int'l Typo. Union*, 125 Wash 273, 216 P 358 (1923); *United Union v. Dave Beck*, 100 Wash Dec 412, 93 P(2d) 772 (1939).

See also the following federal cases holding the secondary strike illegal because violative of the Sherman Anti-Trust Act: *Duplex Printing Press Co. v. Deering*, 284 US 443, 41 S Ct 172, 65 L Ed 349, 16 ALR 186 (1922); *Bedford Cut Stone Co. v. Journeymen Stone Cutters Ass'n*, 204

274 US 37, 47 S Ct 522, 71 L Ed 916 (1927); *Irving v. Neal*, 209 F 471 (DC SD NY 1913); *United States v. Brims*, 272 US 540, 47 S Ct 169, 71 L Ed 403 (1920); *Gill Engraving v. Doerr*, 214 F 111 (DC SD NY 1914); *Decorative Stone Co. v. Building Trades Council*, 18 F(2d) 333 (DC SD NY 1927); *Irving v. Carpenters Union*, 180 F 806 (CC SD NY 1910). See also *Int'l Brotherhood v. Western Union Tel Co* 6 F(2d) 444 (CCA 7, 1925).

But see *Diamond Full Fashioned Hosiery Co. v. Leader*, 20 F Supp 467 (DC ED Pa 1937) and *Levering v. Morris*, 71 F(2d) 284 (CCA 2, 1934) cert den 293 US 595, 55 S Ct 110, 79 L Ed 668 (1934), holding a secondary strike a "labor dispute" within the purview of the Norris Act and hence unenjoinable in the absence of a showing of pre-conditions set forth in the Norris Act to the granting of labor injunctions. See also *Aeolian Co. v. Fischer*, 27 F(2d) 660 (DC SD NY, 1928), 29 F(2d) 679 (CCA 2, 1928), 35 F(2d) 34 (DC SD NY 1929), *Iron Molders Union v. Allis-Chalmers Co.* 166 F 45, 20 LRA(NS) 815, 91 CCA 631 (CCA 7, 1908).

²² *Bricklayers' Union v. Ruff*, 160 Md 483, 164 A 52, 83 ALR 448 (1931).

²³ 192 Mass 587, 78 NE 753, 6 LRA(NS) 1067, 116 Am St Rep 272, 7 Ann Cas 638 (1906).

thinks best." It would seem logically, that those states which purport to recognize an absolute right to strike²⁴ (Alabama, Arizona, California, Florida, Illinois, Kentucky, Maryland, Minnesota, Missouri, New Jersey, Oklahoma, Texas, Virginia and Washington) should likewise all of them permit the secondary strike. That logic is not a trustworthy guide to the future, however, is illustrated by the rules in Illinois, Maryland, Virginia and Washington, which, though purporting to recognize an absolute right to strike irrespective of motive or purpose, condemn the secondary strike. In *Bricklayers' Union v. Ruff*,²⁵ for example, the court stated in clearest terms labor's absolute right to strike. "It seems now definitely settled," said the court in that case, "that workingmen have the undoubted right to . . . peaceably strike or quit work, without liability, in cases where there is no contract of employment to the contrary; that what is a legal right of an individual does not become illegal simply because done in combination with others by concerted action. . . . To enforce the opposite view would lead to the establishment of involuntary servitude." Nevertheless when the union argued that it had a right to engage in a secondary strike because "the union employees of the plaintiff had the right to quit work without assigning any reason or being liable for any loss flowing from such action," the court replied that "while this is an ingenious argument, we do not think the position taken is tenable," and the court proceeded to hold the secondary strike illegal.

Section 104. The Sympathetic Strike.

The nature of the sympathetic strike has been set forth above, in distinguishing it from the primary and general strike.²⁶ Although the analytical remarks there made would seem but to follow the lines of natural demarcation, whatever authority there is on the sympathetic strike confuses

²⁴ See, for a discussion of the viewpoint that the right to strike or to engage in a primary peaceful boycott ought to be held an absolute

[1 Teller]—20

right, *supra*, section 14.

²⁵ 160 Md 483, 154 A 52, 83 ALR 448 (1931).

²⁶ *Supra*, section 104.

it with the secondary strike. Thus in Fred S. Hall's book on "Sympathetic Strikes and Sympathetic Lockouts,"²⁷ sympathetic strikes are classified as follows:

"Class I—Where the sympathetic strikers are in the service of the same employer.

"Class II—Where the sympathetic strikers are in the service of employers who do business with the offender.

1. Sell goods or services to them.

2. Buy goods or services from them.

"Class III—Where the sympathetic strikers are in the service of employers who compete with the offender.

"Class IV—Where the sympathetic strikers are in the service of employers who cooperate with the offender.

"Class V—Where the sympathetic strikers are in the service of employers who have no relation to the offender."

The difficulty with the above classification is that classes I and II and possibly IV are at most, secondary strikes. Class I may constitute a primary strike, as where the employees of A strike because X, one of the employees, has been discharged for union sympathy or agitation. For this reason, the statistics tabulated in Hall's book relating to the prevalence of the sympathetic strike in the United States cannot be accepted as trustworthy. The same must be said of John A. Fitch's statement in the *Encyclopaedia of the Social Sciences*,²⁸ that "sympathetic strikes amounted to 2 per cent of all labor disputes in the United States from 1916 to 1932, and to less than 1 per cent from 1881 to 1905," since no precise statement is made in definition of the sympathetic strike.

The cases reflect the confusion of definition. In *Oakes on Organized Labor and Industrial Conflicts*, it is stated,²⁹ that "a sympathetic strike—that is, one in which the striking employees have no demands or grievances of their own, but strike for the purpose of directly or indirectly aiding others, have no direct relation to the advancement of the interests of the strikers—is an unjustifiable invasion of

27. (1928) at p. 52.

Title "Strikes and Lockouts."

28. 14 *Ency. of the Soc. Sci.* 421.

29. (1926) section 290.

the rights of the employer.”³⁰ Many cases are cited in support of the alleged rule of law. An examination of the cases cited, however, reveals that not a single case involves a sympathetic strike, being concerned, in some cases, with a primary strike, and in others with a secondary strike. Illustrative is *Lehigh Structural Steel Co. v. Atlantic Smelting Works*,³¹ cited by Oakes, where the court paid obiter tribute to the strike “in sympathy with the endeavors of their . . . brethren and to advance the common cause of organized labor.” But the decision of the court went against the workers. The case involved a strike by the employees of a contractor in New Jersey, upon the ground of unfair labor practices by the same employer on a different job in New York. The New Jersey employees were members of the same union, although of a different local, as the New York employees. There was in existence a contract between the union and the employers’ association. The case may therefore be viewed as a primary strike, having been instituted by the same union against the same employer in accord with the machinery of a collective bargaining agreement.³² The court held the strike bad because it sought to achieve the closed shop.

What has been said above may be said with equal truth of an American Law Reports note, which purports to deal with “sympathetic strikes.”³³ None of the cases cited, upon examination, deal with sympathetic strikes. Illustra-

30. 92 NJ Eq 131, 111 A 376 (1920).

31. See *Newark Ladder Co. v. Furniture Workers Union*, 125 NJ Eq 99, 4 A(2d) 49 (1939).

32. 83 ALR 458 (1933). The definition of a sympathetic strike set forth in the beginning of the annotation, however, is excellently conceived and clearly stated: “This annotation is limited to a consideration of the validity of sympathetic strikes, —that is, strikes in which the striking employees have no demands or

grievances of their own, but strike for the purpose of indirectly aiding others, having no direct relation to the advancement of the interests of the strikers; and in no wise involves such questions as that of the right of a union to refuse to work on materials produced or transported by nonunion labor . . . or its right to refuse to handle goods manufactured or sold by a third person with whom the union is in dispute, or the refusal to work on a job on which a person with whom the union is in dispute is a contractor. . . .”

tive is *Pacific Typesetting Co. v. International Typographical Union*,³³ where the court held that a labor union which, to aid its strikes against employers with which it has a controversy, calls out employees of a neutral with whom it has no controversy, except that he is furnishing supplies to the employers under pre-existing contracts, is liable in damages for the injuries thereby inflicted. Here it seems, was a clear case of a secondary strike. In *Ruling Case Law*, it is frankly stated that, "With respect to sympathetic strikes, the paucity of authority prevents a statement of what might be regarded to be the consensus of opinion as to their legality."³⁴

Section 105. The General Strike.

There can be no such thing as discussion about "the state of the law" with respect to the general strike. One might as well discuss the legality of revolution. (A general strike is an action of treason when involved in failure, while as a successful insurrection it creates its own legality.) The Jacobin Club became the government of France, while the Paris Commune terminated its existence at the hands of rifle squads. (We are more likely to find a history of the general strike in the rise and fall of governments, and in martial law books than in judicial decisions.)

The most comprehensive historical study of the general strike is that contained in Wilfrid Harris Crook's book, "The General Strike—A Study of Labor's Tragic Weapon in Theory and Practice."³⁵ [It is here pointed out that the general strike admits of a threefold classification:³⁶ "There is the *political* general strike, with the aim of exacting some definite concession from the existing government, such as the demand for universal suffrage in the Belgian general strikes, or more rarely for the purpose of upholding the existing government against a would-be usurper, as in the German strike against the Kapp-Putsch in 1920. The *economic* strike is perhaps the most common form, at least

³³. 125 Wash 273, 216 P 358, 33 bor."

ALR 767 (1923).

³⁵. 1931.

³⁶. Volume 16, p. 439, title "La-

³⁶. At page vii.

at the beginning of the strike, and is exemplified by the Swedish Strike of 1909. The *revolutionary* general strike, aiming at the definite overthrow of the existing government or industrial system, may be revolutionary in its purpose from the very start, or it may develop in countries where labor has not been long or intensively organized, or where influential leaders are largely syndicalist or anarchist in viewpoint, such as Russia in 1905, Spain or Italy." 37

Two drives, and not merely one, have given life to the general strike. The first has exerted its influence "when in moments of desperate protests the workers feel that other avenues of appeal have been deliberately blocked or destroyed." 37 Russia's revolution of 1905 was the consequence of such a general strike. The return to unbridled individualism after the World War occasioned general strikes in Winnipeg, Canada, and in Seattle, Washington, both in the year 1919.

The second drive is identified with the revolutionary philosophy of anarcho-syndicalism. "Direct Action" was a plank in an edifice of thinking which argued that political pressure is ineffective to achieve a workers' world. Sorel, in his "Reflexions sur la Violence" reasoned that the general strike was the successful termination of workers' efforts at taking over the social order. An excellent explanation of syndicalism as expounded by its leading exponent, Georges Sorel, has been made by Carmen Haider in her book "Capital and Labor Under Fascism:" 38 "Sorel attempted to transfer the labor problem from the field of politics into that of pure economics. Denouncing the present social order as unjust and regarding the laborer as deprived of his fair share by the profiteering employer, Sorel advocated the reorganization of society in favor of the wage earner. The workers of a given enterprise or a given trade

37. Crook, General Strike, 6 Ency of the Social Sci. 607, 612 See, for French cases involving the general political strike in France in November, 1938, in protest against decrees of the Daladier government restoring the six-day week and increased hours

of employment in the interest of national defense, Note 1940, 53 Harv L Rev 1399-1400

38. Columbia University Studies in History, Economics and Public Law (1930) p. 35.

should unite unto one syndicate and this executive organ, rendered powerful by the rigid discipline of its members, should by aggressive tactics push the employer back, step by step, while the central syndicate organizations should counteract the policies of the united employers. The employers, gradually deprived of all means of production, would finally surrender legal ownership of them to the united employees. The wage-earners would thus become the sole producing force of the population, and therefore exclusively entitled to represent it. The state, which in its democratic and liberalistic form is an organ of control in the hands of the bourgeois class, should simultaneously be eliminated and replaced by the union of all workers. To attain this end, the workers and their leaders should neglect no opportunity to weaken the property-holding class by revolutionary action." Sorel seemed to assume that employers would sit back idly while the workers' syndicalist schemes of destruction were being carried on.

In two cases, one in America, and the other in England, courts have been met with the problem of construing the words "general strike" as employed in given contracts. In *Weber v. Collins*³⁹ the contract, which was one to erect a building, contained a clause excusing delay caused by a general strike. It appeared that the operators of the planing mills in the City of St. Louis struck against all of the 28 mills in that city. It does not appear from the case whether the operators were members of a single union, nor does it appear for what purpose they struck. The strike was held a "general strike" within the meaning of the contract. The case is not one defining the meaning of the words "general strike" but is one which merely interprets the meaning of certain words used in connection with a particular contract. In the English case,⁴⁰ the holding was to like effect in connection with a set of facts relating to a charter party similar to that involved in the American case, except that it appeared that some of the workmen did

39. 139 Mo 501, 41 SW 249 (1897). *Ekman & Co.* 18 Times LR 606

40. *Aktieselskabet Shakespeare v.* (1902).

not join in the strike. The court nevertheless held the strike to be a general strike, reasoning, according to a report of the case, as follows: "Lord Justice Vaughan Williams said that the first question was whether there was a 'general strike' within the clause of the charter party. He did not think that 'general' was used in opposition to 'partial' and, therefore, he did not think that it could be said that there was not a general strike merely because some as distinguished from all of the men were on strike. He thought that a strike was a general strike if it was not what he would call a particular strike. By a particular strike he understood a strike either by an individual workman or by a particular body of workmen working for a particular master. But if there was a strike against all the masters, and if that strike was taken part in by the workmen irrespective of the masters for whom they were working that amounted to a general strike."] e

Section 106. The Sit-Down Strike.

The early months of the year 1937 precipitated upon America a distinctly new type of legal problem—that of the sit-down strike.⁴¹ The sit-down strike has been defined as occurring "whenever a group of employees or others interested in obtaining a certain objective in a particular business forcibly take over possession of the property of such business, establish themselves within the plant, stop its production and refuse access to the owners or to the others desiring to work."⁴² Issue is taken with the above definition, however, insofar as it explains the sit-down strike in terms of *taking over* of possession on the part of the employees. The genuine sit-down strike involves rather the *remaining in possession* by employees. [The sit-down strike should more accurately be defined as a strike in the traditional sense, to which is added the element of trespass by the strikers upon the property of the employer.] The distinction here made condemns the so-called sit-down strike in

41. See Note (1937) 23 Va L Rev Rev 149.

799; McClintock, Injunctions against Sit-Down Strikes (1938), 23 Ia L

42. CCH Labor Law Service, 1937-1940, p. 332.

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the case of *Apex Hosiery Co. v. Leader*,⁴³ as nothing more than a case of unlawful entry, since there the participants in the alleged sit-down strike were not mainly the employees of the factory but outside union members who came in after the strike was called.

The cases, both federal and state, have uniformly outlawed the sit-down strike,⁴⁴ and whatever statutory enactment there is on the subject condemns it.⁴⁵ The final word outlawing sit-down strikes has been written by the United States Supreme Court in *National Labor Relations Board v. Fansteel Metallurgical Corporation*.⁴⁶ It appeared that the National Labor Relations Board⁴⁷ had ordered reinstatement of striking employees, including those engaged in a sit-down strike, upon the ground that their discharge and the strike were the direct consequences of unfair labor practices committed by the employer in that it had coerced and

43. Injunction proceeding. 90 F (2d) 155 (CCA 3, 1937) reversed on another ground, 302 US 656, 58 S Ct 362, 82 L Ed 508 (1937). Action for treble damages under the Sherman Act, 108 F(2d) 71 (CCA 3, 1939) (reversing the district court), *aff'd* 310 US 469, 60 S Ct 982, 84 L Ed 1311 (1940).

44. State courts: *Plicity v. Local No. 37 Int'l U. etc.* Superior Ct Los Angeles Co. California, March 4th, 1937; *Chrysler v. Int'l U., United A.W. of America et al.* Circuit Ct. Wayne Co Michigan, March 15th, 1931; *General Motors v. Int'l U., United A. W. of America*, Genesee Co. Michigan, Feb. 2nd, 1937; *Fansteel Co v. Amalgamated Ass'n*, 295 Ill App 323, 14 NE(2d) 991 (1937) (where the court, in punishing sit-down strikers for contempt for violation of an injunction against further occupation of a plant, overruled the contention that the National Labor Relations Act prevents state courts from assuming jurisdiction to punish acts committed in the course

of a labor dispute), *Holland v. Minnesota* (one man sit down strike) 184 Okla 640, 69 P(2d) 764 (1939); *McNeely & Price Co v Grabowski*, Com Pls No 1 #4698 (Pennsylvania, 1937) question moot, 3 A(2d) 125 (Pa S Ct, 1939).

Federal courts: *Apex Hosiery Co v. Leader*, 310 US 469, 60 S Ct 982, 84 L Ed 1311 (1940); *Calmar Steamship Co. v. the Steamships Oakman and Lozman*, Admiralty #2222, 2225, September 17th, 1937.

45. The sit-down strike has been outlawed by statute in Massachusetts (1937 Laws, c. 436, Sec. 8A), Tennessee (1937 Laws, ch. 160) and Vermont (1937 Laws, c. 210). In addition, the state Labor Relations Acts of Massachusetts, Minnesota, Pennsylvania and Wisconsin include the sit-down strike as one of enumerated employee unfair labor practices.

46. 306 US 240, 59 S Ct 490, 83 L Ed 627, 123 ALR 599 (1939).

47. *Fansteel Metallurgical Corp. v. NLRB* 124 (1938).

interfered with its employees in connection with their right to organize, and had refused to recognize for purposes of collective bargaining the union which represented an appropriate majority of employees.⁴⁸ The facts indicated, moreover, that the employer had reemployed some of those engaged in the sit-down strike, while refusing to employ others. The Circuit Court of Appeals⁴⁹ set aside the Board's order, and on appeal to the United States Supreme Court the holding of the Circuit Court was affirmed. The High Court held the sit-down strike to be "illegal seizure" of the employer's property, and a "resort to force and violence in defiance of the law of the land."⁵⁰ It has, however, been held that a sit-down strike in connection with a plant situated wholly intrastate is not a restraint upon interstate commerce within the meaning of the Sherman Anti-trust Act, notwithstanding that the goods manufactured in the plant were largely shipped outside the state, and that there was interference not only with the manufacture of goods but also with the shipment in interstate commerce of the goods also manufactured and ready for sale, where the sit-down strike is not part of a plan to affect competition or union conditions in more than one state.⁵¹

It is to be hoped that the *Fansteel* decision has placed a quietus upon further indulgence by labor in the sit-down strike. The case marks what is hoped to be the end of an unfortunate chapter in the history of American labor activity. The breakdown of union discipline which was one

48. The Board's action was in accord with a policy, and a line of Board holdings pursuant to the policy, that employee misconduct is not a bar to reinstatement unless amounting to a felony (and even then under certain circumstances) where there is a causal connection between the employee's misconduct and a prior unfair labor practice committed by the employer. See *infra*, section 319, for relevant cases under the National Labor Relations Act.

49. *Fansteel Metallurgical Corp. v.*

NLRB, 98 F(2d) 375 (CCA 7, 1938).

50. See also *Apex Hosiery Co. v. Leader*, 310 US 469, 60 S Ct 982, 84 L Ed 1311 (1940) where the court, speaking of the sit-down strike therein involved, said: "The record discloses a lawless invasion of petitioner's plant and destruction of its property by force and violence of the most brutal and wanton character. . . ."

51. *Apex Hosiery Co. v. Leader*, 310 US 469, 60 S Ct 982, 84 L Ed 1311 (1940).

of the consequences of the sit-down strike probably occasioned a feeling of gratitude on the part of labor leaders themselves when the sit-down strike was outlawed. There is danger, however, in viewing the sit-down strike solely as the reflection of lawless labor leadership. The causes of its emergence are deeper. Indeed, labor has contended that capital and labor share equal responsibility for its rise and development. No analysis of the sit-down strike can claim a broad view of the subject, says labor, without a full measure of consideration of the infamous Mohawk Valley methods used by Remington-Rand to break strikes, nor to the facts elicited in the recent Rand-Bergoff trial under the Byrnes Act.⁵² The sit-down strike, it is continued, placed open responsibility for ruthlessness and violence upon law violating employers. It does not entirely lead to solution of the problem raised by the sit-down strike to view with alarm its consequences as the results of labor gone mad, or acting naughty in a methodical way. The anarchy of law which resulted from unlawful employer utilization of instruments of violence and chicanery in disregard of law needed the sit-down strike as an effective counterpoise. The social circumstances which occasioned statutes, both state and federal,⁵³ aimed at curbing employer use of violence to break strikes must be considered if the causes of the sit-down strike are to be adequately understood. As early as 1912, the Commission on Industrial Relations created by Act of Congress in 1912 foresaw the necessity for the enactment of legislation similar to the provisions now con-

52. Robert P. R. Brooks, *When Labor Organizes* (1937). The famous "Mohawk Valley Formula" has been elaborately outlined in *Matter of Remington Rand, Inc.* 2 NLRB 626, aff'd by the Circuit Ct of Appeals in 94 F(2d) 862 (cert. den. by the United States Supreme Court). See also Leo Huberman, *the Labor Spy Racket* (1937). c/f. *New York Times*, December 22nd 1939, p. 1: "School for union sabotage barred as garment men plead guilty.—A

union operated school for sabotage was disclosed."

53. State Laws (the so-called "Pinkerton Laws") are in force in a number of states. See Note. 37 Col LR 816, 833 (1937). The federal law, known as the Byrnes Act (18 USCA section 407A) forbids the transportation in interstate commerce of strikebreakers to interfere with lawful picketing. The federal statute, and comparable state statutes are found at section 410, *infra*.

tained in the National Labor Relations Act. Commenting upon the violence and bloodshed which characterized industrial disputes of the time, the commission argued that strengthening of labor organization was necessary to the achievement of industrial peace, and to that end deprecated the then current practice by employers of "(a) refusal to permit employees to become members of labor organizations, and (b) refusal to meet or confer with the authorized representatives of employees." So also in 1915, the United States Commissions on Industrial Relations advocated in the interest of peace and social justice, (1) rigid supervision over private detective agencies; (2) prohibition of the use of armed guards, and (3) clarifying the powers of militiamen in cases involving industrial disputes. It is no coincidence that statistics show a precipitate drop in the prevalence of sit-down strikes immediately upon validation by the United States Supreme Court of the National Labor Relations Act.⁵⁴ Indeed, our highest court has stated that "experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace."⁵⁵

Section 107. Effect of Strikes upon Performance of Contracts.

Strikes in connection with the performance of contracts raise two main problems: first, whether the strike clause contained in the particular contract is broad enough to cover the particular strike, or, to put the matter in another way, whether the given strike is of a kind as is contemplated by the terms of the strike clause. This involves a problem of interpretation, and is not within the purview of this work.⁵⁶ Second, whether a strike is such impossibility as

54. See N. Y. Times, Wednesday, April 12th, 1939—Speech of Hon. Robert F. Wagner, before the Senate Committee on Labor and Education.

55. *NLRB v. Jones & Laughlin*

Steel Corp. 301 US 1, 57 S Ct 615, 81 L Ed 563, 108 ALR 1352 (1937).

56. See Williston on Contracts (Rev. Ed.) section 1962.

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discharges the contract, further performance of which is rendered impossible by the strike. It is the general rule at common law that the obligation to perform is not vitiated or even affected by a strike.⁵⁷ In some cases, however, it is said that the question depends upon whether the strike was caused by the unreasonable position of the employer.⁵⁸ Professor Williston is of the view that "In the light of the present trend of the law governing impossibility there seems no reason why strikes should not be deemed an excuse on the basis of the failure of a means of performance as-

57. *Barry v United States*, 229 US 47, 33 S Ct 681, 57 L Ed 1060 (1913); *Morse Drydock, etc., Co. v. Seaboard Transportation Company*, 161 F 90 (CCA 2, 1908); *Koski v Finder*, 170 Ill App 284 (1913); *City of Covington v Kanawha Coal, etc., Co.* 121 Ky 681, 89 SW 1126, 3 LRA(NS) 248 123 Am St Rep 219, 12 Ann Cas 311 (1906); *Pratt Gram Co. v. Schreiber*, 213 Mo App 268, 249 SW 449 (1923); *Morrison v. St. Louis, etc., R. Company*, 264 SW 449 (Mo App 1924); *Schaefer v. Brunswick Laundry*, 116 NJL 268, 183 A 175 (1936); *Eppens, Smith & Wiemann Co. v Littlejohn*, 164 NY 187, 58 NE 19, 52 LRA 811 (1900); *Burlington Groc Co. v. Heaphy's Estate*, 98 Vt 122, 126 A 525 (1924).

Proof of usage to show that performance of the contract was subject to the contingency of strikes is inadmissible. *City of Covington v. Kanawha Coal, etc. Co.* 121 Ky 681, 89 SW 1126, 3 LRA(NS) 248, 123 Am St Rep 219, 12 Ann Cas 311 (1906).

In connection with common carriers or other public utilities, the matter is not one of absolute duty resulting from contract, but one of duty to use reasonable care, in the absence of contract, except in cases involving loss or damage to goods, in which case, of course, common carriers are under absolute liability.

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Hence the rule is different for common carriers or public utilities. See *Kennedy, Law and the Railroad Problem* (1923) 22 Yale L Jour 553. *Thompson, Labor and the Law in the Public Utility Field* (1922) 21 Mich L Rev 1; *Williston on Contracts* (Rev Ed) section 1951A. By the United States Carriage of Goods by Sea Act of 1936 (49 Stat 1207, 46 USCA 1300-1315, 49 USCA sec. 25), it is provided that carriers with in the Act are exempt from liability for damage caused by "strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general," but carriers are not relieved from liability for their own acts.

58. See *McGovern v. New York City*, 234 NY 377, 138 NE 26, 34 ALR 1442 (1923). The difficulty of determining the line of demarcation between the employer's unreasonableness and reasonableness in refusing to grant the strikers' demands makes this test highly unworkable. See *Williston on Contracts* (Rev Ed) section 1951A. But the National Labor Relations Act has introduced the notion of unfair labor practices, and it is possible to argue that the rule is operative after determination of the employer's wrongdoing by the National Labor Relations Board.

sumed as essential by the parties to the contract.”⁵⁹

It has been held in some cases that, where the contract does not provide for a definite time for performance, delays caused by strikes may be considered in determining whether performance has been made within a reasonable time.⁶⁰

Section 108. Threat to Strike.

Because persons have an “absolute right to threaten to do what they have the right to do”⁶¹ it is generally held that the legality of a threat to strike depends upon the legality of the strike which is threatened.⁶² Nevertheless, it has sometimes been said that a threat to strike is illegal, without regard for the question whether the strike, if called pursuant to the threat, would be legal.⁶³ The Restatement of

59. Williston on Contracts (Rev Ed) section 1951A.

60. *Empire Transportation Company v. Philadelphia & R. Coal etc.*, Co. 77 F 919, 23 CCA 564, 35 LRA 623 (CCA 8, 1896); *The Richland Queen*, 254 F 668, 166 CCA 166 (CCA 2, 1918), cert. den 248 US 582, 39 S Ct 133, 63 L Ed 432 (1918), *Haas v. Kansas City, Ft. S., etc. R. Co.* 81 Ga 792, 7 SE 620 (1888), *Warren v. Portland Term. Co.* 121 Me 157, 116 A 411, 26 ALR 304 (1922); *Warner v. St. Louis & S. F. R. Co.* 218 Mo App 314, 274 SW 90 (1925); *Gulf, Colo. & S. F. R. Co. v. Levi*, 76 Tex 337, 12 SW 677, 13 SW 191, 8 LRA 323 (1890).

It has been said that a violent strike is more readily considered a reason for excuse than a peaceful strike. *Haas v. Kansas City, etc., R. Co.* 81 Ga 792, 7 SE 620 (1888). *Southern Cotton Oil Co. v. Louisville & N. R. Co.* 15 Ga App 751, 84 SE 198 (1915); *Pittsburgh, Ft. W., etc. R. Co. v. Hazen*, 84 Ill 36, 25 Am Rep 422 (1876); *Pittsburgh, etc., R. Co. v. Hollowell*, 65 Ind 188, 32 Am Rep 63 (1879); *Grelamer v. Lake*

Shore & M. S. R. Co. 102 NY 563, 7 NE 828, 55 Am Rep 837 (1886); *Isaacson v. Starrett*, 56 Wash 18, 104 P 1115 (1909).

61. *Levering & G. Co. v. Morrin*, 71 F(2d) 284 (CCA 2, 1934), cert. den 293 US 595, 55 S Ct 110, 79 L Ed 688 (1934), *National Protective Association v. Cumming*, 170 NY 315, 63 NE 369, 58 LRA 135, 88 Am St Rep 648 (1902).

62. *Kemp v. Division No. 241*, 255 Ill 213, 99 NE 389, Ann Cas 1913D, 347 (1912); *Heywood v. Tillson*, 75 Me 225 (1883). See also *Park & Sons Co. v. National Druggists' Association*, 175 NY 1, 67 NE 136, 62 LRA 632, 96 Am St Rep 578 (1903). *Payne v. Western & C. R. Co.* 13 Lea 507, 49 Am St Rep 666 (Tenn 1884). Cf. *National Protective Association v. Cumming*, 170 NY 315, 63 NE 369, 58 LRA 135 88 Am St Rep 648 (1902). See also Smith, *Crucial Issues in Labor Legislation* (1907), 20 Harv L Rev 268, 269-273. -

63. See Smith, *Crucial Issues in Labor Legislation* (1907) 20 Harv L Rev 268, 269-273.

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Torts ⁶⁴ thus stated the rule which logical reasoning would seem to hold proper: "Whenever . . . workers are privileged to engage in specified concerted action for an object, they are also privileged to threaten to engage in that action for that object." ⁶⁵

⁶⁴ Rest., Torts (1939), section 783.
⁶⁵ 318

CHAPTER EIGHT

PICKETING

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Sections 109. Definitions and Distinctions.

[Picketing is the marching to and fro before the premises of an establishment involved in a dispute, generally accompanied by the carrying and display of a sign, placard or banner bearing statements in connection with the dispute.] The dispute is usually a labor dispute but picketing has quite often been carried on in connection with non-labor disputes.¹ The definition of picketing which has been stated is intended to present the activity of picketing in broadest terms, so as thereby to lay the foundation for necessary distinctions which help to explain many of the cases otherwise instinct with confusion. Recent cases, both of the United States Supreme Court,² and of state courts,³ holding anti-picketing statutes or ordinances unconstitutional partly because of the vague and wide definitions of the word "picketing" therein contained reveal the necessity for re-examination of the several factors involved in the practice of picketing.

Four notions in connection with picketing must be distinguished each from the others. The first is the nature of picketing which, in turn, is divisible into physical nature on the one hand, and legal nature on the other. The second is the function or functions of picketing, while the third is the purpose sought to be served by the practice of picketing. The fourth is the manner in which the picketing is exercised, including therein the number of pickets and the methods employed in picketing.

By the physical nature of picketing it is meant to convey the actual physical doings in connection with the practice

1. See *infra*, section 134.

(1940).

2. *Carlson v. California*, 310 US 106, 60 S Ct 740, 84 L Ed 1104 (1940); *Thornhill v. Alabama*, 310 US 24, 60 S Ct 736, 84 L Ed 1093

3. *Re Harder*, 8 Cal App(2d) 153, 49 P(2d) 304 (1935); *Dimer v. Wales*, 122 SW(2d) 922 (Mo 1938).

of picketing. A child, wholly unaware of the sociological, legal and economic background against which the practice of picketing is carried on, sees simply a man or woman marching to and fro before given premises, factory or plant, carrying a banner. It is in terms of such practice that the word "picket" should be limited, and as so limited, defined.⁴

The legal nature, as distinguished from the physical nature of picketing, is meant to convey the source of legal justification involved in the exercise of picketing. If picketing is the exertion of economic pressure, it is *prima facie* illegal and must justify its exercise in each case. If, on the other hand, picketing is simply the exercise of the right to free speech, he who assails its practice bears the burden of demonstrating its illegality. For similar reasons, legislation designed to limit or qualify the right to picket carries the heavy burden of proving the existence of a clear and present danger, under our constitutional law, to justify the given enactment.

Having thus disposed of the nature of picketing, consideration will now be given to its function. Picketing may have as its function the ascertaining of the identity of non-cooperating workers or of patrons who continue to give their business to the employer involved in the dispute. Again, its function may be simply to apprise the public of the existence of a dispute or still, again, to bolster the mor-

4. *C/f Evans v. Retail Clerks Union*, — (Ct. Com. Pls. Fairfield Co. Ohio 1940), which involved picketing of a store owned by partners operating the store without employees, the purpose of the picketing being to compel the plaintiffs, partners, to observe uniform closing hours on Thursdays and Sundays. The court, after identifying picketing with the exercise of the right to free speech (see *infra*, sections 135-140 for a discussion of the identification) held the picketing legal, but required the pickets to traverse the entire block in

which the store was located, and not to loiter in the immediate neighborhood of the plaintiffs' establishment. Whatever else it might be called, it would seem clear that the activity permitted to be carried on by the court was not "picketing," since picketing involves "loitering" in front of the premises of the establishment picketed, without any obligation or privilege on the part of the pickets to traverse the entire block in which the premises of the person picketed are situated.

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ale of the workingmen involved in the dispute. The Restatement of Torts has thus tabulated some of the several functions performed by the practice of picketing:⁸ ["Pickets stationed at the place of business involved in the dispute may observe it to see the extent of operations and the persons who come there for business. They may also by word of mouth, or signs or placards, seek to dissuade workers and others from entering the plant for purposes of business or from otherwise doing business with the employer. Their mere presence at the plant may be sufficient notice to persons interested that the plant is involved in a labor dispute. Picketing may also be a means of maintaining the morale of the workers involved in the dispute, and of exhibiting to others their unity and determination. Rumors that the workers' morale is weakening, that their ranks are suffering serious defections, and that the strike is being abandoned in favor of a return to work may bring defeat to the workers' cause and are sometimes circulated for that very purpose. Picketing may dispel such rumors."]⁹

The purpose of picketing, as distinguished from its nature, functions and the manner of its being carried on, involves a well-settled notion, the counterparts of which are found in the law governing strikes and boycotts. [The purpose of picketing is the ultimate object thereof, such as to obtain higher wages, or less hours of employment, or the closed shop.]¹⁰

The manner in which picketing is carried on often involves the practice in illegality, even in jurisdictions which recognize the lawfulness of peaceful picketing for a lawful purpose. In *Mlle. Reif v. Randau*,¹¹ for illustration, it appeared that picketing of a beauty parlor was carried on in the following manner: "on at least one occasion a so-called picket masqueraded, the plaintiff saying as a gorilla, the defendant admits as a monkey, and paraded in front of the plaintiff's establishment, and it is charged that this gorilla, going through the antics of his ancestors, carried a

⁸ Rest., Torts (1939), Section 6. 166 Misc 247, 1 NYS(2d) 511 (1937).
⁹ 372.
¹⁰ 372.
¹¹ 372.

sign 'I was once a beautiful woman' while a fellow picket shouted 'don't patronize Mlle. Reif; this is what happens if you patronize this place.'"

Each of the distinctions above noted are important because legal consequences are affected. In jurisdictions which prohibit picketing in the absence of a strike, or under anti-picketing statutes or ordinances, or in connection with disputes wherein labor's given purpose does not permit of the practice of picketing under the law of the given jurisdiction, it becomes important to determine whether the given activity carried on constitutes picketing, so as to be illegal, or whether, on the other hand, it is something else (whether legal or illegal), or, finally, whether it is simply the exercise of an unobjectionable right to persuade or of the right to free speech.⁷ In *People v. Armentrout*,⁸ strikers stood in front of the theatre struck against, reading and shouting large headlines of a newspaper which denounced the theatre as unfair to organized labor. They were convicted by the court below under an anti-picketing ordinance. Upon appeal it was contended that the strikers were simply exercising the right to free speech. The court, however, drew a distinction between reading and shouting of the headlines in connection with the sale of the newspaper, and similar reading and shouting intended to achieve the results denounced in the ordinance under cover of sale of a newspaper which was, in fact, not offered for sale or sold. The conviction was sustained because it appeared that the newspaper was not offered for sale or sold but was, on the contrary, simply used as a cloak to picket the premises of the theatre involved in the labor dispute. Similarly in

7. Sometimes the question is raised in connection with proceedings to punish the violation of an injunction order against picketing. It has been held that such an order may be violated by one standing silently before the premises of an establishment involved in a dispute, though he says nothing to the workmen passing, and makes no attempt to interfere with their ingress or egress.

Re Longell. 178 Mich 305, 144 NW 841, 50 LRA(NS) 412 (1914). In *Roesch Enamel Range Co. v. Carbine*, 247 Ill App 248 (1928), an anti-picketing injunction was held violated by trailing an automobile carrying workmen returning from work, by stopping it and assaulting one of the workmen.

8. 118 Cal App 261, 1 P(2d) 556 (1931).

Blumauer v. Portland Moving Picture Machine Operators Protective Union,⁹ the court enjoined further shouting of the headlines of a newspaper in connection with the picketing of a theatre involved in a labor dispute. "These headlines," said the court, "the pickets display and call out so loudly that the patrons inside of the theatre could hear as well as those who were entering or leaving the building. It does not appear that there was any real effort to sell the papers."

A wide view of picketing was taken in *Crouch v. Central Labor Council*.¹⁰ There picketing had been enjoined because carried on in the absence of a strike. Thereupon a woman commenced to parade in front of the plaintiff's business holding a copy of the "Oregon Labor Press" in her hands and displaying it to passersby. Under her arm and in her pocket she carried other copies of the paper, offering to sell it to the public; in some instances she gave the paper away. She uttered no words other than "Oregon Labor Press." Headlines of the paper dealt with the plaintiff's labor practices. The court held this to constitute picketing, saying: "If the acts of defendants complained of were not picketing in the technical sense, it was designed to accomplish the same purpose for which picketing is used. In substance, it was the same as picketing." It has been held that picketing includes interviewing employees on the street or at home.¹¹

A narrow view of picketing, on the other hand, was taken in *New Hostess Ice Cream Company v. Milwaukee Building & Construction Trades Council*,¹² where the employer sought to enjoin the particular labor activity carried on because none of the employer's employees were members of the defendant union nor did they have any dispute with the employer. Under the Wisconsin Anti-Injunction Act, a "labor dispute," the existence of which is necessary to insulate such activities as picketing from injunctive relief ex-

9. 141 Or 399, 17 P(2d) 1115 (1933).

10. 134 Or 612, 293 P 729, 83 ALR 193 (1930).

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11. *State v. Personett*, 114 Kan. 680, 220 P 520 (1923).

12. — Wis —, — NW — (1940).

cept in accordance with the Act, is defined to mean "any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives. Any organization with which either the employer or such majority is affiliated may be considered a party to the labor dispute. . . ." The employer contended that the defendant's activity constituted picketing, and was hence enjoinable. The union, on the other hand, contended that they were simply advertising the existence of the controversy in a manner to invoke the right to free speech. The facts were that the union advertised over the radio that the employer was "unfair," and also marched around the town, in the vicinity but not in front of the establishment which sold the plaintiff's product. In isolated instances, bannering was engaged in before the premises of the stores handling the plaintiff's products. Under these circumstances, the Court held against the plaintiff upon the ground that no picketing but simply exercise of the general right to free speech was being carried on. As to the isolated acts of picketing, the court said they called for application of the maxim *de minimis non curat lex*. The case was colored by the plaintiff's breach of a union contract with another A. F. L. union, and the court's consequent view of the plaintiff's conduct as inequitable.

In *Thompson v. Delicatessen Workers Union*,¹³ it was held that the distribution of handbills and the carrying of signs near but not in front of the plaintiff's premises could not be enjoined, though the plaintiff had terminated the strike by filling the strikers' places even though, under the New Jersey law, picketing was illegal in the absence of a strike and the right to picket ceased upon the employer's terminating the strike by filling the strikers' places.¹⁴ The activity of distributing handbills

13. 8 A(2d) 133 (NJ Eq 1939)

14. This does not, according to one case, appear to be the present New Jersey law. Although picketing is illegal in the absence of a strike in

New Jersey, the right to picket, according to *McPherson Hotel Co. v. Smith*, 127 NJ Eq 187, 12 A(2d) 136 (1940) is not lost simply by the employer's replacing the strikers

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and carrying signs near but not in front of the plaintiff's premises, said the court, did not constitute picketing, and the fact that some of the plaintiff's customers were given the handbills was held to be "merely accidental." The reasoning of the court was as follows: "The present activity of defendant is in no sense picketing, as that term is used in our decisions. The agents of the union do not use the street in front of complainant's store and they are unable to press themselves especially on the attention of complainant's employees or of people about to enter the restaurant. The situation would be different if Market Street were a country lane so that the union agents at the corner of Broad Street could watch who enter or leave the restaurant . . . but in the crowd of people on the streets, this is impossible. If a handbill be given to a person who sometimes goes to complainant's restaurant it is merely accidental. Complainant is no more injured than if defendant inserted an advertisement in a newspaper." In *Green v. Samnelson*,¹⁶ picketing was enjoined where carried on by negroes for the purpose of securing the employment by the employer picketed of negro employees instead of white employees. The court nevertheless permitted the organization which had theretofore carried on the picketing to make speeches concerning the controversy in the vicinity of the employer's premises.

Distinctions have also been drawn by different courts between "picketing," assumed to be illegal,¹⁸ and (1) "patrolling," and (2) the use of "missionaries," assumed to be legal. *Sterling Chain Theatres v. Central Labor Council*¹⁹ illustrates the permissibility of the "patrol" which was held legal provided the patrollers carried on at a distance more than 100 feet away from the place patrolled.¹⁷ *American Steel Foundries v. Tri City Central Trades*

with other employees, where the business does not return to normal.

See *infra*, sections 119, 120

15. 168 Md 421, 176 A 109, 99

ALR 893 (1935)

16. 155 Wash 217, 233 P 1081 (1930).

17. To similar effect see *Local No. 313 v. Stathakis*, 136 Ark 86, 205 SW 450 (1918).

Council,²⁰ originated the notion of the allowable employment of "missionaries," by which was meant in that case the stationing of a single person before each large entrance of the employer's factory.

It has been indicated in one case that where the placards employed by the person advertising the existence of the dispute do not mention the name of the persons against whom the labor union directs its propaganda, the situation is not one involving picketing, even though the complainant is the only person against whom the propaganda could possibly be directed.²¹ In *Paramount Pictures, Inc. v. United Motion Picture Theatre Owners*²² the court referred to the practice of bannerizing the skies by the use of huge letters formed by smoke generated by aeroplanes as "picketing from the sky."

The early view of picketing considered its function to be that of ascertaining the identity of non-cooperating workers or patrons,²³ and in some more recent cases this view has been reiterated.²⁴

Current discussion of picketing concerns mainly its legal nature. [The traditional view with respect to the legal na-

18. 257 US 184, 42 S Ct 72, 68 L Ed 189, 27 ALR 360 (1921). See also *Stearns & Co. v. United Mine Workers of America* (Mich Wayne Co Circuit Ct 9/20/39).

19. *Blumenthal v. Feintuch*, 153 Misc 40, 273 NYS 660 (1934). "The union has a right to appeal to the public not to buy non-union goods, and that it happens in this case by a coincidence that the only such goods are the plaintiffs' does not make the appeal an illegal secondary boycott." *Blumenthal v. Feintuch*, supra. c/f *Spanier Window Cleaning Co. v. Awerkin*, 225 AD 735 (1935); *Commercial Window Cleaning Co. v. Awerkin*, 138 Misc 512, 240 NYS 787 (1930).

20. 93 F(2d) 714 (CCA 3, 1937).

21. See *Iron Molders Union v. Albia Chalmers Company*, 166 F 145, 20

LRA(NS) 315, 91 CCA 631 (CCA 7, 1908); *Cumberland Glass Mfg. Co. v. Glass Blowers Ass'n*, 59 NJ Eq 479, 46 A 208 (1899); *Citizens Co. v. Asheville Typographical Union*, 187 NC 42, 121 SE 31 (1924); *Hoster Brewing Co. v. Giblin*, 14 OS & CP Dec 305 (1903). See also *Karges Furniture Co. v. Amalgamated Woodworkers Union*, 165 Ind 421, 75 NE 877, 2 LRA(NS) 788, 6 Ann Cas 829 (1905).

22. *Paramount Enterprises v. Mitchell*, 104 Fla 107, 140 S 328 (1932); *Evening Times Printing & Publishing Co. v. American Newspaper Guild*, 124 NJ Eq 545, 199 A 598 (1938); *Crouch v. Central Labor Council*, 134 Or 612, 293 P 729, 83 ALR 193 (1930). In all three cases, persuasion was stated to be an additional function of picketing.

ture of picketing considered it to be the exertion of economic pressure, but the courts were divided over the question whether picketing constituted coercion or persuasion. Those courts, by far the overwhelming majority in number, which considered picketing to be the exercise of persuasion came to the conclusion that peaceful picketing was legal,²³ while other courts, steadily diminishing in number (and whose holdings may be entirely obsolete in the light of the United States Supreme Court's holdings in *Senn v. Tile Layers Protective Union*,²⁴ *Carlson v. California*²⁵ and *Thornhill v. Alabama*)²⁶ have held that there is no such thing as lawful picketing because picketing is inherently coercive or possesses ready tendencies toward violence.²⁷ The view most recently advanced in connection with the legal nature of picketing assumes its function as a persuasive (not a coercive) weapon and argues that picketing is not the exertion of economic pressure but simply the exercise of the right to free speech.²⁸

Section 110. Reasons for the Rise in the Practice of Picketing.

Cases involving the practice of picketing have increased in the last decade to the extent almost of monopolizing the attention of courts throughout the United States. The causes for the rise in the practice of picketing are not difficult to understand. Picketing, unlike the propaganda type of boycott, requires many less active participants in its behalf, and consequently a much more modest financial expenditure to carry on. Moreover, it brings pressure to bear at the most effective point—before the premises of the person involved in the dispute. Union funds are not often equal to the task of nationwide boycotts such as those

23. See *infra* section 111.

24. 301 U.S. 468, 57 S. Ct. 857, 81 L. Ed. 1229 (1937).

25. 310 U.S. 106, 60 S. Ct. 746, 84 L. Ed. 1104 (1940), briefed *infra*, section 139.

26. 310 U.S. 88, 60 S. Ct. 736, 84 L. Ed. 1093 (1940), briefed *infra*, section 139.

tion 138. See sections 135-140, *infra*, for the relationship between picketing and free speech.

27. See *infra*, section 112.

28. See *infra*, sections 135-140, for an analysis of the relationship between picketing and the right to free speech.

involved in the Buck's stove company case,²⁹ or the Danbury Hatters case.³⁰ Again, publication of unfair lists, such as those formerly utilized by the American Federation of Labor, require of the public the reading of papers containing numerous firms allegedly unfair to organized labor. That cooperation in the face of such a practice was rarely achieved, can readily be surmised. So much for the reasons why picketing has gradually taken the place of the general boycott. Preference of the picket over the strike involves simply a choice of one weapon requiring large outlays of monies, the cooperation of great numbers and consequently the almost certain probability of success as a condition to its employment, over a weapon necessitating comparatively little expenditure of money and its employment over long periods of time without grave hardship to the participants and the disaster attendant upon failure. Picketing also performs a function peculiar to itself, i. e., the unionization, at modest financial cost, of non-union areas which compete to the detriment of areas unionized. The legality of picketing in the absence of a strike is an important concern of labor because of the difficulty, if not the impossibility at times, of obtaining the strike support of workingmen who, while satisfied with the conditions of their employment, work under such conditions as to enable their employers to undersell employers operating according to union standards.

The cases generally assume that picketing may be carried on against one or only some of many employers engaged in the same trade or industry. In no reported case has the contention been advanced with any success that picketing ought to be enjoined because the complainant is the sole employer in the industry subjected to the practice. In two cases, however, the fact that the complainant was the only person in the trade subjected to picketing was the basis for holdings against its lawfulness. An analysis of the

²⁹ *Gompers v. Buck's Stove & Range Company*, 221 US 418, 31 S Ct 492, 55 L Ed 797, 34 LRA(NS) 874 (1910).

³⁰ *Loewe v. Lawlor*, 208 US 274, 28 S Ct 301, 52 L Ed 488, 13 Ann Cas 815 (1906).

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cases reveals that it was not because the complainant was the sole employer in the industry to be picketed, but for other reasons, that illegality resulted. The first case is *Wiest v. Dirks*,³¹ where the defendant sought by secondary picketing to coerce signature by a dairy products company of a closed shop contract. The signs carried by the pickets, in connection with the picketing of the food store which sold the milk of the dairy products company, carried the following legend: "Please buy union dairy products only. This store sells milk produced in an unfair dairy." It appeared that all the dairy products in the community were produced in plants none of which employed union labor exclusively. The picketing was enjoined because the bannering created a false impression. "The natural conclusion to be drawn from the information upon the banners," said the court, "is that the appellee was selling non-union products by choice when he might obtain union products. . . . This, according to the evidence is not true."

*Busch Jewelry Company, Inc. v. United Retail Employees Local*³² is the other case. There pickets, members of Local 144 of the Window Trimmers Union, were punished after trial by jury, for violation of a labor injunction order. It appeared that the defendant union had theretofore been enjoined from further picketing because of numerous excesses in the exercise thereof.³³ Thereupon, Local 114 of the Window Trimmers Union was prevailed upon to commence picketing as a means of evading the operation of the injunction against the defendant union. The court pierced the illegal scheme, and in punishing the pickets, said: "The testimony showed strong convincing proof that the primary purpose of the picketing by your Local 144 was to circumvent the injunction order one day after its issuance. The plan was to reach out after Busch and no other jeweler or jewelry store. The evidence clearly shows that window dressers are not employed in any jewelry store, but that their activities have been confined to shoe and textile stores

31. 20 NE(2d) 969 (Ind 1939).

32. 169 Misc 156, 7 NYS(2d) 872 (1938).

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33. 168 Misc 244, 5 NYS(2d) 576 (1938), aff'd 281 NY 150, 22 NE(2d) 320 (1939).

where the goods handled are of a gross character and never applied to such commodities as jewelry. Jewelry always has been handled by bonded salespeople. Though there are three hundred jewelry stores in the City of New York only the Busch stores were affected by your picketing." Picketing in the *Busch* case was proscribed because *mala fide*, as seeking not to unionize in its own behalf but in behalf of another union which had, through excess, completely lost the right to picket.³⁴ There is no reason to suppose that the *Busch* case stands for the proposition that picketing of a single entrepreneur is illegal if bona fide and acting in behalf of its own efforts at unionization, solely upon the ground that other entrepreneurs similarly situated are not likewise picketed.

In *Buckingham Transportation Co. v. Int'l Brotherhood of Teamsters*,³⁵ mention was made by the court of the fact that the plaintiff alone was being picketed, although all the other transportation lines going out of Denver were likewise non-union. Picketing was enjoined not for that reason, however, but because it was carried on in the absence of a strike (which was at the time assumed to be an illegal form of picketing in the State of Colorado)^{35a} and for the further reason that picketing was being carried on not to unionize the plaintiff but to retaliate against the plaintiff because its employees had crossed a picket line set up by the union at another company.

The Restatement of Torts³⁶ has thus stated with approval the rule, assumed by the cases, that labor activity need not be carried on against all employers at the same time nor need the conditions of the contract with respect to which the labor activity is carried on be the same for all employers: "The propriety of an object of concerted action by workers is . . . unaffected by the discriminations which the workers' labor union may make between the em-

34. See, in this connection, *In re Wholesale Beverage Salesmen's Union*, 6 A(2d) 660 (NJ Ch 1939).

35. 1 CCH Lab. Cas 1239 (Colorado Dist Ct 2nd Judicial District 1930).

35a. See *infra*, section 117n, for the present state of the Colorado law in this respect.

36. Section 783 (Introductory Note).

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employers with whom it deals. Thus, it is not material in determining the legal propriety of the demands that the union demands a higher wage from one employer than from another, that it demands a closed shop from one employer without demanding it from others or that it seeks a system of seniority in one plant without requesting it in another. Labor bargains are not all made at once." This is not to say, of course, that labor activity may be carried on for the ulterior purpose of excluding a given employer or a given number of employers from competition in the industry. The showing of such facts would undoubtedly transform the given activity from a legal to a wholly illegal form of activity.

It has been held that the employer's duty to bargain collectively with the proper bargaining agency of his employees under the National Labor Relations Act is not affected by the fact that the employer's competitors have not or are not likewise bargaining with their employees.³⁷

Section 111. Peaceful Primary Picketing in Furtherance of a Lawful Strike Is Generally Held Legal.

Cases permitting the exercise of picketing bear much more recent dates than those involving the legality of the primary strike. Indeed, the winds shifting from illegality to lawfulness in the case of the primary picket have met with higher mountains and have been embroiled in fiercer storms than those with which the primary strike was obliged to contend. The very word "picket," it has been said, "is borrowed from the nomenclature of warfare, and is strongly suggestive of a hostile attitude toward the individual or corporation against whom the labor union has a grievance."³⁸ And the judicial attitude towards the activity of picketing has been evidentiary of its hostile reception by American courts. Thus in *Thomas v. City of Indianapolis*,³⁹ picketing

³⁷ *Harbor Boatbuilding Company*, 1 NLRB 349 (1936). The Board said: "It is clear that an employer cannot refuse to bargain collectively on the ground that his competitors have not

entered into negotiations or made agreements with their employees."

³⁸ 16 RCL 453

³⁹ 195 Ind 440, 193 NE 550 (1935). The case has been repudi-

is scornfully defined as a form of "organized espionage," while in *Atchison Ry. Co. v. Gee*,⁴⁰ the court went so far as to say in words often quoted, that "there is and can be no such thing as peaceful picketing any more than there can be chaste vulgarity or peaceful mobbing or lawful lynching." That the learned judge who wrote the last quoted remarks devised similes perhaps a bit too inapposite is evidenced by the language and holdings of more recent cases culminating in *Exchange Bakery v. Rifkin*,⁴¹ where the court categorically stated that "picketing connotes no evil." In *George B. Wallace Company v. International Association*⁴² the court observed: "The doctrine that picketing is necessarily a species of coercion and intimidation is dogma long since discarded."

The right to engage in peaceful primary picketing in connection with a lawful primary strike may now be considered as having been stamped with approval by the greater number of jurisdictions.⁴³ There is almost general agreement

ated by a later Indiana case, *Local 26 v. Kokomo* 211 Ind 72, 5 NE(2d) 624, 108 ALR 1111 (1937)

40 139 F 582 (CC SD Iowa, 1905) To the same effect see *Goldfield Cons Mines Co v. Goldfield M U* 159 F 500 (CCD Nev 1908). Also *Chalmers Co v. Iron Molders Union*, 150 F 155 (CC ED Wis 1906), and see *American Steel Foundries v. Tri City Central Trades Council*, 257 US 184, 203 42 S Ct 72, 66 L Ed 189, 27 ALR 360 (1921), where Chief Justice Taft, in connection with the holding of the court construing the Clayton Act as merely declaratory of the law theretofore existing, noted that "Congress carefully refrained from using in Section 20 the 'sinister name of picketing'" In *Union Pacific R Co v. Ruef*, 120 F 102 (CCD Neb 1902), picketing was said to be "a pretense for persuasion but intended for intimidation."

41 245 NY 260, 157 NE 130 (1927), reargument denied 245 NY

651, 157 NE 835 (1927)

42 155 Or 652, 63 P(2d) 1090, 1095 (1936)

43. *United States*.—See *Thornhill v. Alabama* 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940); *Carlson v. California*, 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940) See also for the legality of picketing

(1) Under the Norris Act, *infra*, section 214, and *Lauf v. Shinner*, 303 US 323, 58 S Ct 578, 82 L Ed 872 (1938). *New Negro Alliance v. Sanitary Grocery Co* 303 US 352, 58 S Ct 703, 82 L Ed 1012 (1938);

(2) Under the Clayton Act, *infra*, sections 195, 196 and *American Steel Foundries v. Tri City Central Trades Council*, 257 US 184, 42 S Ct 72, 66 L Ed 189, 27 ALR 360 (1921);

(3) Under the Sherman Act, *infra*, section 422

Arizona -Truax v. Bisbee, 19 Ariz 379, 171 P 121 (1918).

California.—*Lisse v. Local Union*, 2 Cal(2d) 312, 41 P(2d) 314 (1935),

with the statement made by the New Jersey court in

but injunction granted because of violence. In the case of *In re Harder*, 9 Cal App(2d) 153, 49 P(2d) 304 (1935), a local ordinance prohibiting picketing was held invalid.

Colorado.—*People v Harris*, 204 Colo. 386, 91 P(2d) 989 (1939), holding a state anti-picketing statute unconstitutional as an interference with free speech, *Denver Local Union v. Perry Truck Lines, Inc.*, 101 P(2d) 436 (Colo 1940)

Connecticut.—*Levy & Devaney, Inc. v. International Pocketbook Workers' Union*, 114 Conn 319, 158 A 795 (1932), but injunction granted because of violence, *Loew's Enterprise v International Alliance*, 125 Conn 391, 6 A(2d) 321 (1939)

Georgia.—*Jones v Van Winkle Gin.*, 131 Ga 336, 62 SE 236 (1908); *McMichael v Atlanta Envelope Co*, 151 Ga 776, 108 SE 226 (1921). But picketing by a labor union to procure the discharge of a non union employee is illegal *Robinson v Bryant*, 181 Ga 722, 184 SE 298 (1936).

Idaho.—*Robison v Hotel Local 35*, 141 Id 418, 207 P 132 (1922), where to dissuade employers, but aliter where to dissuade customers. See also *L* 1933, c 215, p 452, *Boise Street Car Co. v Van Avery*, 103 P(2d) 1107 (Idaho 1940).

Illinois.—*Fenske Bros. v Upholsterers International Union*, 385 Ill 239, 193 NE 112, 97 ALR 1318 (1934), cert den, 295 US 734, 55 S Ct 645, 70 L Ed 1682 (1935); repudiating *Barnes v. Chi. Typographical Union*, 232 Ill 402, 83 NE 932 14 LRA(NS) 1018, 13 Ann Cas 54 (1908).

Indiana.—*Local 26 v. Kokomo*, 211 Ind 72, 5 NE(2d) 624, 108 ALR 1111 (1937) holding invalid a local ordinance prohibiting all picketing and thereby repudiating *Thomas v. City*

of Indianapolis, 195 Ind 440, 15 NE 550 (1924) upon the ground of conflict with the 1933 Indiana Anti-Injunction Act, *Seofes v. Helmar*, 205 Ind 596, 187 NE 662 (1933)

Kentucky.—*Music Hall Theatre v. Moving Picture Machine Operators Local*, 249 Ky 639, 61 SW(2d) 283 (1933).

Louisiana.—*Dehan v Hotel & Restaurant Employees*, 159 S 637 (La 1935)

Maryland.—*International Pocketbook Workers Union v. Orlove*, 158 Md 496, 148 A 826 (1930)

Massachusetts.—*Samuel Simon v Max Hamlin*, 1 CCH Lab Cas 672 (Sup Ct of Mass Suffolk Co 1918) questioning *Vegeahn v Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722, 57 Am St Rep 443 (1896) wherein picketing was held illegal per se. In *Simon v. Schwachman*, 18 NE(2d) 1 (Mass 1938), *Vegeahn v. Guntner*, supra, was held bad law because of the State Anti Injunction Act which legalized picketing

Minnesota.—*Steffes v. Motion Picture Machine Operators' Union*, 136 Minn 200, 161 NW 524 (1917), *Minnesota Stove Co v Cavanaugh*, 131 Minn 456, 155 NW 638 (1915). See also *Hanson v. Hall*, 270 NW 227 (Minn 1938)

Missouri.—*Ex parte Heffron*, 179 Mo App 639, 162 SW 652 (1914); *St. Louis v Gloner*, 210 Mo 502, 109 SW 30 (1905); *Jo Dan Market v Wentz*, 223 Mo App 772, 20 SW(2d) 567 (1929).

Montana.—*Empire Theatre Co. v. Cloke*, 53 Mont 183, 163 P 107, LRA 1017E 383 (1917).

Nevada.—See *City of Reno v. Second Judicial District*, 95 P(2d) 994, 125 ALR 948 (Nev 1939), holding an anti-picketing ordinance of the City of Reno unconstitutional and void

Bayonne Textile Corporation v. American Federation of Silk Workers⁴⁴ to the effect that "the modern view is that picketing is not per se unlawful and should not be enjoined if peaceably carried on and for a lawful purpose." Where picketing is legal it is not necessary, according to the mea-

because constituting a suppression of free speech.

New Jersey. — **Bayonne Textile Corp. v. Am Fed of Silk W.** 116 NJ Eq 146, 172 A 551 (1934); **Restful Slipper, Inc. v. United Shoe & Leather U** 174 A 543 (1934). Earlier cases held to the contrary. See **Baldwin Lumber Co. v. Brotherhood of Teamsters**, 91 NJ Eq 240, 109 A 147 (1920). Peaceful picketing, even though in connection with a lawful strike, is illegal if carried on by an "outside" union against a "small" as distinguished from a "large" business. **Dolan v Cooks Union**, 124 NJ Eq 584 (1938).

New York. — **Exchange Bakery & Restaurant v. Rifkin** 245 NY 260, 157 NE 130 (1927), reargument denied 245 NY 651, 157 NE 895 (1927).

North Dakota. — **L** 1935, c 247, p. 350

Ohio. — **La France v. I. B. F. W.**, 108 Ohio St 61, 140 NE 899 (1923); **Standard Tube & Forkside Co v International Union**, 7 Oh NP 87 (1899), **Perkins v. Rogg**, 11 Oh Dec Rep 85 (1892), **Clark Lunch v. Cleveland Waiters Local**, 22 Oh App 265, 154 NE 362 (1926). In **Savoy Realty Co v. McGee**, 4 Oh Op 88 (1935), and **Mutual Benefit Life Ins Co v. McGee**, 4 Oh Op 99 (1935), picketing of an apartment house by a labor union engaged in a dispute with the union was held illegal because annoying to the tenants.

Oklahoma. — **In re Sweitzer**, 13 Okla Cr 154, 162 P 1134 (1917).

Oregon. — **George B. Wallace Co. v. International Association**, 155 Or 652, 63 P(2d) 1090 (1936).

Pennsylvania. — **Morris Run Coal Min Co. v. Guy**, 14 Pa Dist 600 (1905), **Kirmse v. Adler**, 311 Pa St 79, 166 A 566 (1933).

Rhode Island. — **Bomes v. Providence Local No. 223**, 51 RI 491, 155 A 581 (1931). There, the court seems in dicta to have recognized the legality of peaceful picketing in furtherance of a lawful strike. Picketing was entirely enjoined, however, because of evidence of violence in its past exercise. A dissenting opinion questioned the sufficiency of the evidence in regard to violence, and observed that the case "leads strongly to the conclusion that the real basis of the complaint arises from the fact that the complainant's business was affected by the publicity given to his position in regard to labor."

Texas. — **International Association v. Fed Assn** 109 SW(2d) (1937), repudiating **Cooks, Waiters and Waitresses Local v. Papageorge**, 230 SW 1086 (1921).

Utah. — **L** 1933, c 15, p. 25. 1933 Rev Stat Section 49, c 2.

Virginia. — **Everett Waddy Co. v. Richmond Typographical Union**, 105 Va 188, 53 SE 273 (1906).

West Virginia. — **National Woolen Mills v. Journeymen Tailors Union**, 100 W Va 627, 131 SE 357 (1920).

Wisconsin. — **Am Furniture Co v. Teamsters Union**, 268 NW 250 (1936).

Wyoming. — The Wyoming Anti-Injunction Act (**L** 1933, c 37, as am. by **L** 1937, c 15) would seem to permit peaceful picketing.

44. 116 NJ Eq 146, 172 A 551 (1934).

ger dicta upon the question, for the pickets to be members of the picketing union. Outsiders may be employed for such purpose.⁴⁵ It is provided by Section 11(d) of the Minnesota State Labor Relations Act, however, that it is an unfair labor practice for picketing to be carried on in furtherance of a strike unless a majority of the pickets are employees of the picketed establishment.

Section 112. View That Picketing Is Illegal Per Se.

[Notwithstanding the general acceptance of the rule that peaceful picketing is legal and that its illegality depends upon a showing of unlawful purpose or unlawful means by which it is carried on, there are several jurisdictions which still question the legality of peaceful picketing⁴⁶] The present state of the law in these jurisdictions is precarious, to be sure, in the light of emergence of the notion that picketing is the equivalent of free speech,⁴⁷ and also in the light of United States Supreme Court decisions favoring the legality of peaceful picketing.⁴⁸ Nevertheless the legality of peaceful picketing in the jurisdictions to be noted, and whose decisions will be stated below, is presently not at all clear.

[Picketing has been declared illegal per se upon two theories. The first is that the ready tendency to violence deemed to be inherent in the picket necessitates a rule not permitting lower courts to speculate upon the character]

45. *Aberdeen Restaurant Corp. v. Gottfried*, 158 Misc 785, 285 NYS 932 (1935) *Accord Rest. Torts* (1939), Section 780 *c/f* *Busch Jewelry Co. Inc. v. United Retail Employees Union*, 100 NYLJ 2312 (S Ct NY Co December 24, 1935).

46. See, for federal court holdings questioning the legality of picketing per se, *American Steel Foundries v. Tri-City Central Trades Council*, 257 US 184, 42 S Ct 72, 66 L Ed 189, 27 ALR (1921) (but permitting "missionaries"), and especially *Otis Steel Co. v. Local Union*, 110 F 898 (DCND Ohio 1901); *Consolidated Steel & Wire*

Co. v. Murray, 80 F 811 (DCND Ohio 1897); *Kolley v. Robinson*, 187 F 415 (CCA 8, 1911); *Southern Ry. Co. v. Machinists' Local Union*, 111 F 49 (DCWD Tenn 1901); *Sona v. Aluminum Castings Co*, 214 F 936 (CCA 6, 1914).

47. See *infra*, sections 135-140

48. See *Senn v. Tile Layers Protective Union*, 301 US 468, 57 S Ct 837, 81 L Ed 1220 (1937); *Thornhill v. Alabama*, 310 US 88, 60 S Ct 730, 84 L Ed 1093 (1940); *Carlson v. California*, 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940).

of the picketing, whether peaceful or not, after the harm has been done.⁴⁹ The second and more generally advanced theory views the picket as inherently and necessarily intimidating.⁵⁰

Alabama. The Alabama Anti-Picketing Statute⁵⁰ which was construed to render illegal picketing of any kind⁵¹ was held unconstitutional by the United States Supreme Court in *Thornhill v. Alabama*⁵² upon the ground that the Statute contained no definition of the word "picketing" and was so vague in other respects as to constitute a deprivation of the right to free speech.⁵³

Arkansas. The view that picketing is illegal in the State of Arkansas was first most outstandingly expressed in *Local 313 v. Stathakis*.⁵⁴ The rationale of the decision may be gleaned from the following quotation of the language used by the court: "The decree enjoins picketing at and near appellee's premises, and the operation of the injunction is limited to that immediate vicinity. The reason for the limitation is manifest. A presentation of labor's grievances elsewhere gives the member of the public whose support is thus solicited an opportunity for reflection; but when the picketing is conducted in the small space of the frontage of the business picketed, the effect of that conduct is practically immediate. No opportunity for reflection is afforded. One must choose immediately between defying the picket and acceding to his appeal, so that interference necessarily results to the business there being conducted. We conclude, therefore, that the decree of the court enjoining the picketing under the conditions stated is right

49. *Barnes v. Chi Typographical Union*, 232 Ill 421, 83 NE 194, 14 LRA(NS) 1018, 13 Ann Cas 54 (1908). Peaceful picketing is now permissible in Illinois, the *Barnes* case having been repudiated in *Penske Bros. v. Upholsterers Union*, 358 Ill 239, 193 NE 112, 97 ALR 1318 (1934), cert. den. 295 US 734, 55 S Ct 645, 79 L Ed 1682 (1935).

50. *Alabama A. Code* (Michie 1928) p. 1921.

51. *Hardie Tynes Mfg Co. v. Cruise* 189 Ala 66 66 S 657 (1914). See also *O'Rourke v. Birmingham*, 232 Ala 355, 168 S 206 (1936), rehearing den. 168 S 209 (1936).

52. 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940).

53. *Thornhill v. Alabama*, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940), is briefed *infra*, at section 139.

54. 135 Ark 86, 205 SW 460 (1918).

and proper, and should be affirmed." One is constrained to wonder where, under the decision above quoted, the workingmen are required or permitted to picket. Certainly not in front of anybody else's premises. The pickets must presumably choose some deserted lot, there to shout their demands to the empty spaces

In a later case, *Riggs v. Tucker*,⁵⁵ labor was said to have a right peacefully to picket, but all picketing was enjoined by a divided court because of violence in its past exercise. The recognition of labor's right to engage in peaceful picketing would seem to be inconsistent, however, with the insistence upon the part of the court that the *Stathakis* case was still the law of the State. The court said: "it is said that this *Stathakis* case is ancient law, although that opinion was written by the writer of this. It is said also that public opinion and the view of the courts have since changed, and that this change has been evidenced by such legislation as the Norris-La Guardia Act passed by the Congress of the United States and by the legislation of several of the states patterned after it. That argument may be answered by saying that the General Assembly of this State has passed no legislation depriving the courts of this State of the power to issue injunctions in labor strikes in proper cases, and the law as announced in the *Stathakis* case remains unchanged in this state."

Florida. Picketing was considered unlawful per se in *Paramount Enterprises v. Mitchell*.⁵⁶ "Picketing," said the court, "is relevant." The court then continued as follows: "A set of facts that would constitute picketing in one community might be far from doing so in another. Picketing on the part of a black-smith's apprentice or an automobile mechanic in an isolated community would excite little interest or comment, but in highly industrialized communities where every trade, business or profession is supported wholly or in part by those industries, their influence so permeates the social and economic structure that public senti-

⁵⁵ 196 Ark 571, 119 SW(2d) 507 ⁵⁶ 104 Fla 407, 140 S 324 (1932).
(1938).

ment becomes very sensitive to the causes and tension arising from an industrial dispute. Under such circumstances, picketing is often fraught with disastrous consequences and should not be permitted to continue." Picketing, then, "in an isolated community" which "would excite little interest" would presumably be legal. But picketing where picketing becomes a necessary reflex of the factory system, and where, consequently, public sentiment naturally becomes "very sensitive to the causes and tension arising from an industrial dispute," is illegal. Picketing is legal to the extent only that it is innocuous. Its significance is likewise its doom.⁵⁷

In *Weissman v. Jureit*⁵⁸ the court said that picketing could not be enjoined except upon proof that the pickets used threats, force, violence, coercion or intimidation. "Let us agree on the fact" said the court, "that picketing was done by some members of the union. The burden was on the plaintiff to show that members of the labor organization resorting to picketing used threats, force, violence, coercion or intimidation, which has not been established by the evidence. While it is true that the plaintiff testified to certain losses to his business incurred by this method, at most his conclusions were not only vague and indefinite but highly speculative and insufficient upon which to predicate a decree."

It is difficult to evaluate the meaning of the quoted matter. Would picketing have been enjoined if the plaintiff had testified to losses clearly demonstrable? If so the anomalous rule in Florida is to the effect that picketing is legal only to the extent that it causes no losses to the business of the employer picketed.

In *State v. Borman*⁵⁹ a local ordinance prohibiting peaceful picketing was held invalid upon the ground that the ordinance was ultra vires the city's charter powers. The legality of peaceful picketing was indicated, if not clearly expressed.

57. *c/f Heitkemper v. Cent. Labor Council*, 99 Or 1, 192 P 765 (1920)
 "In a large city one could not do much effective persuading in a matter

of this kind except in the vicinity of the employer's place of business"

58. 132 Fla 661, 181 S 898 (1938)
 59. 189 S 609 (Fla 1939).

§ 112 LABOR DISPUTES AND COLLECTIVE BARGAINING

Clear recognition of the legality of peaceful picketing in connection with a lawful strike appears to be contained in *Retail Clerks Union v. Lerner Shops, Inc.*,⁶⁰ but the holding of the court in this case was that picketing was illegal because carried on by outsiders and not in connection with a strike.

Idaho. In the State of Idaho, a rule has been developed peculiar to that jurisdiction. It has there been held that picketing though primary, peaceful and in furtherance of a lawful strike, is legal to the extent only that it seeks to dissuade employees from returning to or resuming work. Picketing designed to influence the employer's customers is illegal.⁶¹ The very statement of the Idaho rule would seem to reveal the difficulty if not the impossibility of applying it to cases where both employees and customers pass through the employer's door. It is questionable whether Idaho will cling to the distinction, in the light of its 1933 Anti-Injunction Act,⁶² patterned upon the Norris law.⁶³ In *Boise Street Car Company v. Van Avery*,⁶⁴ picketing in connection with a strike was held immune from injunction because constituting a "labor dispute" under the Anti-Injunction Act, in the absence of evidence satisfying the requirements of the Act.⁶⁵

Iowa. The legality of peaceful picketing was questioned in *Ellis v. Journeymen Barbers Union*,⁶⁶ but dicta employed by the court would seem to indicate that peaceful banner-ing by silent pickets would be held legal.

Kansas. Picketing of industries "affected with a public interest" as defined by statute is illegal by virtue of statu-

60. 193 S 529 (Fla 1939)

61. *Robison v Hotel & Restaurant Employees*, 35 Idaho 418, 297 P 132 (1922) Arkansas seems also to have leaned to such a distinction. See *Local U v. Stathakis*, 135 Ark 86, 205 SW 45 (1918)

62. L 1933, c 215, p. 452

63. 47 Stat 70 (1932), 29 USCA Secs 101-115

64. 103 P2d 1107 (Idaho 1940).

65. It appeared in this case that

the union had sought to further its campaign against the employer, a transportation company operating buses, by operating "courtesy cars" over the company's routes. This the court held illegal and enjoined, because not an activity legitimately related to labor disputes and also because invading the company's franchise rights

66. 194 Iowa 1179, 191 NW 111 (1922).

tory enactment.⁶⁷ The inherent unlawfulness of picketing was indicated in *Crane & Co. v. Snowden*⁶⁸ where it appeared, however, that there was physical interference with ingress and egress in connection with the place of business picketed. A clearer intimation to the effect that all picketing is illegal in Kansas is contained in *Bull v. International Alliance*.⁶⁹ The holding of the court in that case was that the State Anti-Injunction Act, a prototype of the Clayton Act, was inapplicable to the picketing involved therein, because carried on in the absence of a strike and consequently not involving any employer-employee relationship, but the court indicated that all picketing, whether carried on by employees or not, was illegal. The court noted that the Act excepted from its operation cases involving irreparable injury to property or a property right. The Trial Court found that the picketing was injurious, that there was no adequate remedy at law and that the defendants were unable to respond to the plaintiffs in damages. "It follows," said the Appellate Court, "that the case does not come within the prohibition even if the Act were construed to apply to disputes between others than employers and employees." The picketing involved in the case was peaceful. Nevertheless the court said of the Anti-Injunction Statute: "if it were given the broad application contended for prohibiting in cases like the one under consideration where duress conspired to and did injure plaintiff's business and property rights to the extent that their acts constituted a nuisance to the plaintiff and the public, it would fall within the rule of *Truax v. Corrigan*,⁷⁰ holding that an act which would make lawful an interference with an owner's business and deprive him of property rights would not be due process or equal protection of the law and would be a violation of the 14th amendment of the Federal constitution."

Maine. In *Keith Theatre v. Vachon*,^{70a} where picketing in the absence of a strike or for the purpose of securing

67. 1935 Stat sec 44-617.

70. 257 US 312, 42 S Ct 124, 66 L

68. 112 Kan 217, 210 P 475 (1922). Ed 254, 27 ALR 375 (1921).

69. 119 Kan 713, 241 P 459 (1925).

70a. 134 Me 92, 187 A 692 (1936).

signature of a closed shop contract was held illegal, the court disparaged the legality of picketing per se with the statement: "In all picketing there is an element not appearing in fair argument and a reasonable appeal for justice."

Michigan. In Michigan the settled judicial doctrine is that all picketing is illegal per se.⁷¹ In a recent case, *Stearns & Co. v. United Mine Workers of America*,⁷² the rule holding peaceful picketing illegal per se in the State of Michigan was reiterated. Nevertheless, the court permitted a single "missionary" along each street of the plant involved in the case, which extended along two streets. Thereby, said the court, the strikers would be permitted to advertise the existence of a strike without being subjected to censure for picketing.

A more recent Circuit Court case, *Wetsman Construction Company v. Bert A. Knight, et al.*,⁷³ has questioned the advisability, in the light of recent labor law developments, of holding picketing illegal per se. "In view of the many changes that have occurred since the last expression of the Supreme Court of Michigan as to the legality of peaceful picketing," said the Court, "this Court believes that it is desirable that the Supreme Court reconsider its position, and this Court believes that if the object to be obtained by the picketing is to improve wages, conditions of employment, or other improvement in the status of the laborers picketing, that picketing should be permitted if lawfully conducted, and not accompanied by force, intimidation, coercion or other abuses." Nevertheless in the *Wetsman* case the court held the picketing carried on under the particular circumstances illegal, because it had the effect of inducing union men, under collective bargaining agreement with the employer, to refuse to go through the

71. *Beck v. Ry Teamsters Union*, 118 Mich 497, 77 NW 13, 42 LRA 407, 74 Am St Rep 421 (1898), *Clarage v. Lufhringer*, 202 Mich 612 168 NW 440 (1918); *Schwartz v. Cigar*

Makers International Union, 219 Mich 589, 189 NW 55 (1922).

72. *Wayne Co Cir Ct 9/20/39*.

73. — NW — (Mich 1940).

picket lines and to report for work in execution of the collective bargaining agreement.

In *Brickley Dairy Company v. United Dairy Workers*,⁷⁴ the court agreed with the defendant's contention that "where a strike exists, the employees may peacefully picket the premises of the employer for the purpose of informing the public that the employer is unfair to union labor"⁷⁵ but picketing was held illegal in the case because carried on by a C. I. O. affiliate against an employer under collective bargaining agreement with an A.F.L. union.

Nebraska. An anti-picketing statute appears to declare all picketing illegal.⁷⁶ The broad sweep of the statute and the absence of a definition of picketing would seem to make the act of doubtful constitutionality in the light of the United States Supreme Court holding in *Thornhill v. Alabama*.⁷⁷

New Hampshire. The view that picketing is illegal per se was taken in *Grimes v. Durnin*.⁷⁸ In an earlier case, *White Mt. Freezer v. Murphy*,⁷⁹ the court drew a distinction between reasonable and unreasonable picketing and intimated that the former might be held legal.

Vermont. Picketing was said to be illegal per se in *State v. Stewart*⁸⁰ upon the broad ground that "the boycott is not the remedy to adjust the differences between capital and labor."

Washington. The early view in Washington considered picketing to be illegal per se.⁸¹ Later decisions, however, recognize the legality of picketing if the pickets confine their operations to an area more than 100 feet away from the premises picketed.⁸² In *Kimball v. Lumber Union*,⁸³

74. 6 LRR 32 (Wayne Co Circuit Ct 1910).

75. See also Opinion of the Attorney General, No. 11, 705, August 2 1939.

76. Neb Comp Stat (1929) sections 28-812, 28-813.

77. 310 US 89, 6 S Ct 736, 84 L Ed 1093 (1940).

78. 80 NH 145, 114 A 273 (1921).

79. 78 NH 298, 101 A 357 (1917).

80. 59 Vt 273, 9 A 559 (1887).

81. *Jensen v. Cooks & Waiters' Union*, 39 Wash 531, 81 P 1069, 4 LRA (NS) 302 (1905); *St Germain v. Bakery & Confectionery Workers' Union*, 97 Wash 282, 166 P 665, LRA 1917F 824 (1917); *Bansch v. Cooks Union*, 99 Wash 378, 169 P 843 (1918); *Danz v. American Federation of Musicians*, 133 Wash 186, 233 P 630 (1925).

82. *Adams v. Local Union*, 124 Wash 564, 215 P 19 (1923); *Sterling*

picketing was permitted "at some distance" from the place picketed. The present trend towards the legality of primary peaceful picketing is evidenced, however, in the holding by the Washington Court in *City of Yakima v. Gorham*⁸⁴ which held an anti-picketing ordinance unconstitutional and void as conflicting with the State Anti-Injunction Act. The court expressly questioned the validity of prior holdings to the effect that picketing was illegal per se, but cited in support of its view that peaceful picketing is lawful the cases wherein picketing was permitted outside of an area 100 feet from the premises of the place picketed. Since the essential physical nature of picketing involves the marching to and fro before the premises of the place picketed and not at any such substantial distance away from the premises as 100 feet, the state of Washington may yet be said to view picketing illegal per se. Nevertheless, the *Gorham* case contained language from which it might be inferred that peaceful picketing is now legal in the State of Washington. Speaking of the *Kimball* case, (*supra*) the court, in the *Gorham* case said: "it is true that in that case the picketing occurred in the woods at a logging camp and in this it occurred on a city street. But we can conceive no difference in the fundamental right by reason of that difference in fact"⁸⁵

Section 113. Picketing Illegal if Connected with Unlawful Strike.

Picketing has everywhere been held enjoined where carried on in furtherance of an unlawful strike.⁸⁶ The pur-

Chain Theatres v. Central Labor Council, 155 Wash 217, 283 P 1081 (1930)

^{83.} 189 Wash 416, 65 P(2d) 1066 (1937)

^{84.} 100 Wash Dec 494 (1939)

^{85.} See also *Jaffe, Status of Picketing in Washington* (1940), 15 Wash L Rev 46 where the writer, speaking of the *Gorham* case, says: "in this decision the majority opinion left no doubt as to the legality of peaceful

picketing per se in this state"

⁸⁶ *Sarros v. Nourris*, 15 Del Ch 391, 138 A 607 (1927); *Fenske Bros v. Upholsterers Union*, 358 Ill 339, 193 NE 112, 97 ALR 1318 (1934), cert den. 295 US 734, 55 S Ct 645, 79 L Ed 1682 (1935); *Rosen v. United Shoe & Leather W. U.* 287 Ill App 49, 4 NE(2d) 507 (1936); *United Shoe Mach. v. Fitzgerald*, 227 Mass 537, 130 NE 86 (1926); *Folsom Engraving Co. v. McNeil*, 235 Mass 269, 126

poses for which strikes may or may not be carried on have heretofore been discussed.⁸⁷ Likewise discussed heretofore have been the social, economic and legal factors which enter into the issue of lawful purpose on the one hand,⁸⁸ and unlawful purpose on the other.⁸⁹ Should the view take hold that picketing is simply the exercise of the right to free speech, it would seem that picketing would be legal even though connected with an unlawful strike.⁹⁰

The legality of the given strike, in connection with which picketing is carried on, has been held to depend upon the law of the state where the picketing takes place, and not upon the law of the jurisdiction where the strike is called. In *Lora Lee Dress Company, Inc., v. I. L. G. W. U.*,⁹¹ where picketing was carried on in New Jersey in connection with a strike called in New York, it was held that the picketing was illegal and could be enjoined, the court saying: "This court is not concerned with the legality or illegality in New York of the activities there being conducted. Suffice it to say that those activities, having for their object the attainment of a monopoly of the labor market in the dressmaking industry of an area such as New York City, where it is known a great proportion of the dressmaking industry of the country is concentrated, if carried on in New Jersey, would be declared illegal. A strike being for an illegal purpose, all activities in furtherance thereof are illegal."

NE 479 (1920). *Hughes v. Kansas City M P O U*, 282 Mo 304 221 SW 95 (1920), cert den 254 US 632, 41 S Ct 7, 65 L Ed 448 (1920); *Waslewski v Bakers' Union*, 118 NJ Eq 340, 179 A 284 (1935); *Market Street Corporation v. Delicatessen and Cafeteria Workers Local*, 118 NJ Eq 448, 179 A 689 (1935); *Canter Sample Furniture House v Retail Furniture Employees*, 122 NJ Eq 575, 196 A 210 (1937); *Benito Rovira Co Inc. v. Yampolsky*, 187 NYS 894 (1921); *Beckerman v Bakery Union*, 28 Ohio NP (NS) 560 (1931), *Heit-*

kemper v. Central Labor Council, 99 Or 1, 192 P 765 (1920). *Monday v. Automobile Workers*, 171 Wis 532, 177 NW 867 (1920)

87. See *supra*, sections 95-102

88. See *supra*, sections 69-75

89. See *supra*, sections 11-26.

90. See *infra*, sections 135-140 for a discussion of the relationship between picketing and free speech, and especially section 136, for a tabulation of some of the consequences of that relationship

91. — NJ Eq —, — A(2d) — (1940).

Section 114. Picketing Illegal if Carried On for an Unlawful Purpose.

Like the strike, picketing is legal only to the extent that its purposes are within the allowable ambit of labor activity. Thus, for example, jurisdictions holding a strike for the closed shop illegal may be expected to hold picketing unlawful if designed to achieve the same purpose.⁹² Cases declaring strike activity to be lawful or unlawful depending upon the purpose thereby sought to be achieved, may generally be considered as likewise governing the activity of picketing.⁹³ Illustrative cases involving the picket are *Jensen v. St. Paul Moving Pictures*,⁹⁴ where picketing to coerce settlement of a cause of action for damages was held illegal, and *Tunick v. International Association*⁹⁵ where pickets were enjoined from seeking to compel an employer to fix minimum prices determined by the union for cleaning or pressing garments. Picketing has also been carried on for the purpose of preventing non-dues paying union members from entering the picketed plant,⁹⁶ but this activity never reached the courts. In *Federal Hats v. Golden*⁹⁷ picketing was permitted to advertise the existence of a lockout.

In *Driggs Dairy Farms, Inc. v. Milk Drivers Union*,⁹⁸ the

92. See *McKay v. Retail Auto Salesmen*, 97 Cal App 122, 87 P(2d) 426 (1939); *Nusbaum v. Retail Clerks Int'l Pro Ass'n*, 227 Ill App 206 (1922); *Hotel v. Miller*, 272 Ky 471, 114 SW(2d) 501 (1938); *Wasilewski v. Bakers Union*, 118 N1 Eq 349, 179 A 284 (1935); *International Ticket v. Wendrich*, 122 N1 Eq 222, 193 A 808 (1937); *Lichtman v. Leather Workers*, 114 NJ Eq 596, 169 A 598 (1933) holding picketing to compel the closed shop illegal.

93. See *supra*, sections 85-102, for a discussion of the legality of purpose in connection with the strike.

94. 149 Minn 58, 259 NW 811 (1935).

95. 2 CCH Lab Cas 302 (Cal Sup Ct San Francisco Co 1939).

96. Special to the New York Times. "Flint, Michigan, April 18th, 1939 — Nearly 5 000 men and women employees of General Motors were thrown out of work today when pickets of the United Automobile Workers of America forced the Fisher Body No. 1 plant to close . . . Conducting a dues collecting drive in an effort to bolster its finances, hard hit by the business recession, pickets refused to allow any non union worker to enter the Fisher plant and turned away all union members who could not show receipts for current union dues."

97. 222 AD 836, 226 NYS 747 (1928).

98. 49 Ohio App 303, 197 NE 250 (1935).

picketing defendants bannered the plaintiff employer as follows: "This company has continuously violated Section 7(a) [of the National Industrial Recovery Act] by discharging employees who have joined an organization of their own choosing." The court held picketing involving such bannering unlawful, saying: "The evidence fails to show any non-compliance by the plaintiff with that act, but even if it did do so this court does not understand that either the duty or privilege of enforcing that act rests upon the shoulders of any one or all of the defendants."⁹⁹ It has been indicated that picketing to compel an employer to sign a long term collective bargaining agreement is unlawful.¹ Picketing in breach of a collective bargaining agreement is generally held unlawful.² Picketing to compel the reemployment of discharged employees has been said to be both legal³ and illegal⁴ in New Jersey, and in the same state picketing to compel renewal of a collective bargaining agreement has been held illegal.⁵

In *Quinton's Market, Inc. v. Patterson*⁶ the court indicated that picketing carried on for the purpose of compelling an employer to maintain a half holiday on Wednesdays was unlawful and hence enjoined. In *Buckingham Transportation Company v. International Brotherhood of Teamsters*⁷ picketing was carried on under guise of a purpose to unionize the plaintiff's establishment. The evidence indicated, however, that the picketing was designed to re-

99. Accord: *H. B. Rosenthal Ettlinger Co. v. Schlossberg*, NYLJ Oct 18, 1933, p. 1339.

1. *Bones v. Providence Local, M. P. O. U.* 51 RI 499, 155 A 581 (1931).

2. See *supra*, section 86, and *infra*, section 163.

3. *McPherson Hotel Company v. Smith*, 127 N.J. Eq 167, 12 A(2d) 130 (1940). See also *Music Hall Theatre v. M. P. M. O. L.* 249 Ky 639, 61 SW (2d) 283 (1933).

4. *Miller's Inc. v. Journeymen Tailors Union*, — NJ Eq —, — A(2d) — (1940).

5. *Miller's Inc. v. Journeymen Tail-*

ors Union, — NJ Eq —, — A(2d) — (1940). See also *Pando v. Bartenders' Int'l Alliance*, 2 CCH Lab Cas 359 (Penn 1940), *Fornli v. Auto Mechanics U.* 100 Wash Dec 240, 93 P(2d) 432 (1939). *Contra*: *Music Hall Theatre v. M. P. M. O. L.* 249 Ky 639, 61 SW(2d) 283 (1933).

6. 21 NE(2d) 546 (Mass 1939). But see *Evans v. Retail Clerks Union*, — (Ct Com Pls Fairfield Co. Ohio 1940).

7. 1 CCH Lab Cas 1239 (District Court, Second Judicial District, Colorado 1939).

taliate against the plaintiff because its employees had crossed a picket line set up by the union before the premises of another company. The picketing was held illegal.

Picketing for the purpose of compelling the plaintiffs to employ helpers, members of the picketing union, has been held illegal, where it appeared that the plaintiffs were operating their own trucks in connection with their own businesses without the aid of any employees, even though it also appeared that the plaintiffs' manner of doing business seriously interfered with the standards sought to be established in the industry by the picketing union.^{7a}

In New Jersey, definition of "lawful purpose" has developed a distinction in the permissibility of picketing, even though connected with a peaceful strike, between "big business" and "small business." Picketing was held legal in the former case, but illegal in the latter situation,⁸ the court saying: "The labor union was born of necessity. However, that necessity arose not from the abuses of the small business men employing few men, but from the oppression of workmen by large combinations of capital employing such number of men that the individual was reduced to a mere number utterly incapable of audible voice protest against the exactions of unscrupulous employers." The court admitted that "no definite line of demarcation between big business and small business can be drawn, and the number

7a. *Wohl v. Bakery and Pastry Drivers and Helpers Local 259*, AD 868, 19 NYS(2d) 811 (1940) aff'd 14 NYS 2d 198 (1939). Callahan, J., dissented from the holding of the Appellate Division First Department, in an opinion in which Dore, J., concurred. The dissenting opinion stated in part, as follows: "Though plaintiffs had no employees they were conducting business as part of a widespread system of 'peddling' that seriously menaced the standards sought to be maintained by defendant union. 'Peddling' means an arrangement whereby former drivers for manufacturers are aided in pro-

curing trucks, and go into business distributing the products of the manufacturers. Such peddlers work seven days a week, and longer than union hours. Defendant union consists of drivers in the same industry. It had a vital interest in maintaining employment of its members, shorter hours, and a day of rest in seven. Therefore, a labor dispute was involved and it was proper and lawful for it to picket in an orderly manner when defendant wished to protest against the actions of the peddlers."

8. *Dolan v. Cooks Union*, 124 NJ Eq 584 (1938).

of employers may not always be controlling, each case being more or less a law unto itself." Three employees were employed by the plaintiff in the case at bar. All struck. Union intervention was unnecessary in such a case, said the court, to remedy any complaint relating to terms or conditions of employment. Hence, picketing was unlawful.⁹

In *Picker v. Empire Individual Window Cleaning Contractors Union, Inc.*,¹⁰ picketing of the plaintiff's customers, to compel the plaintiff, an independent window cleaning contractor who had resigned from the defendant "union," to pay back dues and fines, was held illegal.

A prolific and ever increasing purpose of picketing is to induce employers to change a business policy determined upon by them, which the union considers detrimental to the interests of its members. Thus in *Dubrow Pure Food, Inc. v. Glazel*,¹¹ picketing was held enjoinable which sought to compel an employer to abandon one business not requiring waiters (cafeteria) and to open another (restaurant) requiring waiters. In *Welinsky v. Hillman*,¹² picketing in protest against the employer's abandonment of part of his establishment was held illegal. In *Lichterman v. Laundry & Dry Cleaning Drivers Union*,¹³ however, picketing was held legal where designed to coerce an employer not to reduce prices, it appearing that the employees' commissions would thereby be affected. In *Meadowmoor Dairies, Inc. v. Milk Wagon Drivers Union*,¹⁴ the plaintiff dairy company sought to enjoin the defendants from picketing stores where its milk was sold or offered for sale. It appeared that the

9. In *Diamond v. United Retail Union* (unreported, stated in *Dolan v. Cooks Union*, 124 N.J. Eq. 584 (1935)) a sole employee struck. Picketing was enjoined.

10. NYLJ October 9, 1937 (S Ct NY Co per Laue, J.).

11. NYLJ November 23, 1932 p 2321.

12. 185 NYS 257 (1920). *Accord Paul v. Mencher*, 169 Misc 657, 7 NYS 821 (1938), *aff'd* 254 AD 851, 6 NYS (2d) 379 (1938), leave to appeal de-

nied by the Court of Appeals, 279 NY 813, 17 NE(2d) 684 (1938); *Wishny v. Jones*, 169 Misc 459, 8 NYS(2d) 2 (1938). See also *Uneeda Credit Clothing Stores, Inc. v. Briskin*, 14 NYS(2d) 964 (1939).

13. 204 Minn 75, 282 NW 689 (1933). *c/f Markowitz v. Retail Dry Cleaners Union*, 3 Oh Op 366 (1935).

14. 371 Ill 377, 21 NE(2d) 308 (1939), *cert. den* 308 US 590, 60 S Ct 128, 84 L Ed 490 (1939).

plaintiff's competitors delivered milk in their own trucks to retail stores and employed drivers therefor who were members of the defendant union. The plaintiff, however, sold its milk directly to individuals who owned or operated their own trucks and who in turn resold the milk to the proprietors of retail stores. The union contended this was unfair to union drivers, who lost employment through the plaintiff's business methods. The plaintiff's application for an injunction was granted, the court holding that picketing for such a purpose was unlawful.¹⁵

A difference more fundamental than appears in the language of the law books divides union and employer in this respect. The union insists that it has an interest in the welfare of its members and that it consequently possesses a right to complain of any business methods adopted by employers which would curtail the employment opportunities or injure the working conditions of union members. Involved in the union's position is the larger contention that industry has a responsibility towards those employed therein. Employers, on the other hand, contend for the absolute right to determine questions of management and policy, and to decide when and how to operate a given enterprise. The perils of the market place are the employer's sole concern. In the *Meadowmoor Dairies* case (*supra*), the issue was sharply drawn and the court resolved it in favor of the employer. This appears by an almost unbroken line of authorities, as has been seen, to be the general rule. The problem, however, is not without difficulties, and solutions have been finding their way into collective bargaining agreements governing industries accustomed to unionization.

An extreme of the union's position was the contention advanced in connection with the sit-down strike. Workers, it was asserted, had such a "right to the job" as to justify

15. See *Moreland Theatres Corp. v. Portland Moving Picture Mach. Op. Union*, 140 Or 35, 12 P(2d) 333 (1932) holding picketing illegal where carried on for the purpose, among others, of inducing the person picketed to employ two union men and not

merely one union man at a stipulated salary, upon the employer's changing his method of doing business from silent to sound films. See also *Lake Valley Farm Products, Inc. v. Milk Wagon Drivers' Union*, 108 F(2d) 430 (CCA 7, 1939).

retention of the employer's property in connection with a labor dispute. Assertions of a "right to work" aimed at inducing government to adopt a more affirmative attitude toward the unemployed is understandable and in some quarters encouraged. But a like assertion advanced as a responsibility of the particular employer involved in the dispute would seem to go too far in a society where individual enterprise is still the focal point in our way of living.

Section 115. Picketing of Residence.

The question as to whether picketing of a residence as distinguished from a place of business is permissible has arisen in two classes of cases: first, where the residence of the employer is picketed; second, where the residence of the employee is picketed. Picketing in the second class of cases, though generally held illegal,¹⁶ has sometimes been held lawful,¹⁷ whereas in the first class of cases picketing

16. *Knudson v. Benn*, 121 F 636 (DCD Minn 1903); *Christensen v. Kellogg*, 110 Ill App 61 (1903). See also *Busch Jewelry Co. v. United Retail Employees Union*, 281 NY 150, 22 NE(2d) 320 (1939), *Murdock v. Walker*, 152 Pa 395, 25 A 492 (1893), *Wick China Co. v. Brown*, 164 Pa 449, 30 A 261 (1894).

In *Remington Rand v. Crofoot*, 248 AD 356, 280 NYS 1025 (1936) aff'd 279 NY 635, 18 NE(2d) 37 (1938), where an injunction which was sought against the union was granted, the complaint prayed for an order restraining the defendants, among other things, "from picketing the homes of the individual plaintiffs, or other employees of plaintiff company, or persons seeking employment with plaintiff company." But in *A. L. Reed Company v. Whiteman*, 238 NY 545, 144 NE 885 (1924) the Court of Appeals held an injunction too broad which contained, and directed

the omission of, a provision enjoining the defendants "from visiting the homes of plaintiff's workers with a view to persuading plaintiff's workers to leave their employment or breach their contracts with the plaintiff."

It has been contended that picketing of a residence ought not to be enjoined, because the common law generally recognizes no right to privacy. *Feinberg, Picketing, Free Speech and "Labor Disputes"* (1940), 17 NYUL Quar 385, 403, 399-400.

17. *Iron Molders Union v. Allis (Chalmers)*, 166 F 45, 20 LRA(NS) 315, 91 CCA 631 (CCA 7, 1908); *So Cal v. Amalgamated Union*, 186 Cal 604, 200 P 1 (1921), *State Line R. Co. v. Brown*, 11 Pa Dist R 509 (1901). *Contra. Barnes v. Chi. Typo. Union*, 232 Ill 424, 83 NE 940, 14 LRA(NS) 1150, 122 Am St Rep 129 (1908) (because all picketing is inherently illegal); *People ex rel Siegel v. Kaye*, 165 Misc 663, 1 NYS(2d) 354 (1937)

has uniformly been held illegal.¹⁸ In *State v. Zanker*,¹⁹ striking pickets were convicted of disorderly conduct for bannering an employee who refused to join the strike as a "strikebreaker" and picketing with such banners before her home. In *State v. Perry*,²⁰ a later Minnesota case, the *Zanker* case was cited with approval, the court adding: "Defendants were endeavoring to carry into the home and domestic life of Gustafson (the complainant) an industrial controversy which should have been left elsewhere."

In this connection, the courts have been confronted with the problem as to what may be said to constitute a home, and what, on the other hand, to constitute a place of business. In *State v. Cooper*,²¹ a private chauffeur picketed the home of his employer. In declaring such picketing illegal, the court overruled the defendant chauffeur's contention that the employer's home was likewise the chauffeur's place of business. The defendant contended further that a holding against him would result in the rule that "employees working in a domestic capacity would be denied the right of picketing which is a right given to other industrial employees." But the court, quoting from *Anderson v. Ueland*²² replied that "the home is a sacred place for people to go and be quiet and at rest and not be bothered with the turmoil of industry, and that as such it is a sanctuary of the individual and should not be interfered with by industrial disputes." In *Senn v. Tile Layers Union*,²³ however, picketing was permitted of a plumber's residence where it appeared that he carried on his business from that

(where the pickets were enjoined also because they issued false statements); *Becker Studios v. Mail Order Catalogue Artists*, NYLJ April 6, 1934, p. 1653. See Stanley High, *Labor in the World of Tomorrow*, *American Mercury*, November, 1939: "The Venezuelan Consulate was picketed because at the New York World's Fair, six (non-union) Venezuelan musicians were employed to play native music."

18. *Davis v. State*, 200 Ind 83, 161

NE 365 (1925); *Baltic Mining Co. v. Houghton*, 177 Wis 632, 144 NW 209 (1913).

19. 179 Minn 335, 229 NW 311 (1930).

20. 265 NW 302 (Minn 1936).

21. 285 NW 903 (Minn 1939).

22. 197 Minn 516, 521, 267 NW 517, 518 (1936).

23. 222 Wis 383, 268 NW 270 (1936), *aff'd* 301 U'S 408, 57 S Ct 857, 81 L Ed 1229 (1937).

residence. In *Rand Tea Co. v. Manganero*,²⁴ striking employees were permitted to picket the employer's trucks and to follow them for that purpose to the place where they delivered merchandise.

In *Muncie Building Trades Council v. Umbarger*,²⁵ a labor union engaged in a controversy with builders of dwelling houses, picketed not only those dwellings but others in the vicinity which were the residences of the plaintiffs. Picketing of the plaintiffs' residences was enjoined.

Under Section 111.06(2a) of the Wisconsin State Labor Relations Law, known as the Employment Peace Act,²⁶ it is declared an unfair labor practice for an employee individually or in concert with others to picket the domicile of any other employee. In an anti-picketing statute in the State of Nebraska,²⁷ it is declared unlawful to picket the place of work or residence of another. The constitutionality of the Nebraska law is doubtful, however, in view of the holding of the United States Supreme Court in *Thornhill v. Alabama*²⁸ declaring an Alabama anti-picketing statute unconstitutional because its breadth and vagueness were menaces to free speech.

In England, picketing of a residence was at first declared to be lawful by the Trades Disputes Act of 1906²⁹ which provided that "It shall be lawful for one or more persons, acting on their own behalf or on behalf of a trade union or of an individual employer or firm in contemplation or furtherance of a trade dispute, to attend at or near a house or place where a person resides or works or carries on business or happens to be, if they so attend merely for the purpose of obtaining or communicating information, or of peacefully persuading any person to work or abstain from working." In 1927, however, by the Trades Disputes and Trade Unions Act³⁰ picketing of a residence was declared

24. 99 NYLJ 53 (1939).

25. 17 NE(2d) 828 (Ind 1938).

26. Laws, 1939, c 57.

27. Comp Stats of 1929 sec 28-813.

28. 310 US 88, 60 S Ct 736, 84 L

Ed 1093 (1940)

29. 6 Edw VII, c 47.

30. 17 & 18 Geo V, c 22. See further, in relation to the English law, annotation, Picketing Home, 122 ALR 734 (1939).

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unlawful not only where intimidating (Section 3 [1]) but also where peaceful (Section 3 [4]). Section 3 (4) provides that "Notwithstanding anything in any Act, it shall not be lawful for one or more persons, for the purpose of inducing any person to work or to abstain from working, to watch or beset a house or place where a person resides or the approach to such a house or place. . . ."

Section 116. Picketing in Communities Privately Owned.

The legality of picketing in communities privately owned, or privately operated, has generally been denied. Thus in *People v. Rosenzweig*³¹ strikers of a concession of the New York World's Fair were denied the right to picket because the Fair was conducted by a private corporation, while in *Seagate Association v. Seagate Tenants Association*,³² the right to picket was similarly denied because the plaintiff was able to show that it was a privately owned and completely enclosed community. In the case of picketing upon public property, as upon a boardwalk under the control of the Park Department of a City, legality has been upheld in the case of *People v. Ribinovich*.³³ In the Ribinovich case the state contended that the Park Commissioner, under the authority granted him to establish reasonable rules and regulations to secure to the public the common enjoyment of parks and other recreation areas, could properly insist upon the securing of a permit as a condition to the right to picket. Reliance was placed on *Davis v. Massachusetts*,³⁴ where the United States Supreme Court held that an ordinance prohibiting any person from making any public address on any public grounds of a city without a permit from the mayor was within the police power and not violative of the fourteenth amendment to the federal constitution. The court, however, pointed out that a number of private businesses abutted upon the boardwalk, and said: "With

31. 171 Misc 702, 13 NYS(2d) 795 (1939).

32. 168 Misc 742, 6 NYS(2d) 387 (1938), *aff'd* 256 AD 949, 11 NYS(2d) 332 (1939).

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33. *People v. Ribinovich*, 171 Misc 569, 13 NYS(2d) 135 (1939).

34. 167 US 43, 17 S Ct 731, 42 L Ed 71 (1897).

such a situation existing, I do not believe that it was intended by the regulation in question to grant to private businesses operating on city property an immunity from the consequences of labor disputes which other private businesses do not possess." The court further pointed out that the Davis case was questioned if not overruled in *Hague v. Committee for Industrial Organization*.³⁵

Section 117. Picketing in the Absence of a Strike—in General.

Picketing plays a varying role, depending upon the type of industry involved in the dispute.³⁶ Where a large number of employees are involved, as in the mining or manufacturing industries, picketing will generally be found to be ancillary to a strike, the purpose in picketing being to dissuade strikebreakers from entering the disputed plant. In goods-distribution industries, where a smaller number of workers are employed, or where goods manufactured under allegedly unfair labor conditions are sold or distributed, picketing will more generally take the form of an independent weapon, unconnected with any strike. Judicial recognition of this distinction is all too rare. In *United Chain Theatres, Inc. v. Philadelphia Moving Picture Operators Union*,³⁷ the distinction was at least indicated, if not clearly stated. The court there noted that "in the present case the plaintiff employs only two men at each theatre. The outside supply of labor is practically unlimited. The calling of strikes would be perfectly futile, and to limit the effect of the Tri-City decision (which permitted the employment of 'missionaries' similar to pickets) to strike cases only would be to deny to employees in

35. 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423 (1939). See, for a more extended discussion of the Hague case, *supra*, sections 36, 37. See also, for the position of company towns and houses under the National Labor Relations Act, *infra*, section 280.

36. See Note (1933), Picketing as an Independent Weapon of Labor be-

fore and under the NIRA, 33 Col. L. Rev. 1188.

37. 50 F.(2d) 189 (DCED Pa. 1931). See also *New Negro Alliance v. Sanitary Grocery Co.* 303 U.S. 552, 58 S. Ct. 703, 82 L. Ed. 1012 (1933), *Goldfinger v. Feintuch* 276 N.Y. 281, 11 N.E.(2d) 910, 116 ALR 477 (1937).

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cases like the present, resort to their only practicable weapon." An additional and most important purpose served by picketing in the absence of a strike is the unionization of non-union territory competing to the detriment of territory already unionized.

The term "picketing in the absence of a strike" is utilized to denote the carrying on of picketing in cases where no dispute exists between the employer and his own employees. Because, in the great generality of cases, such dispute takes the form of a strike, the term "picketing in the absence of a strike" serves to describe in few words the given situation. But it is important to note that a labor dispute may at times exist between an employer and his employees even though technically no strike has taken place, and in such a situation picketing might be held legal in jurisdictions which, generally, refuse to recognize the legality of picketing in the absence of a strike. Thus in the California case of *Irvine v. Projectionists Union*,³³ it appeared that the employer's sole employee was discharged when he refused to work for less wages. Thereupon the union commenced to picket, and the employer brought suit to enjoin the picketing, alleging that no strike existed, and that under California law picketing in the absence of a strike was illegal.³⁴ Under these facts the court held that picketing was immune from injunction, upon the ground that there was a bona fide dispute concerning wages. The union moved to punish the plaintiff for contempt for falsely signing an affidavit alleging that there was no strike when in fact there was a strike and plaintiff well knew there was a strike. The court denied the motion, saying that the statement in the plaintiff's affidavit to the effect that there was no strike, was technically true. If, said the court, the employee whose wages were reduced had voluntarily quit, there would have been a strike in a technical sense, but the opposite was true in this case because the employee remained on the job until he was discharged.

³³ 2 OCH Lab Cas 320 (Super Ct Los Angeles, 1940).

³⁴ See *infra*, this section.

Nineteen states have thus far most directly passed judicially upon the legality of picketing in the absence of a strike, of which only five (Colorado, Montana, New York, Oregon and Wisconsin)⁴⁰ have permitted such picketing,

40. Colorado.—*Denver Local Union v. Perry Truck Lines, Inc* 101 P(2d) 436 (Colo 1940).

Montana.—*Empire Theatre Co. v. Cloke*, 53 Mont 183, 163 P 107 (1917)

New York.—*Nann v. Raimist*, 255 NY 307, 174 NE 690, 73 ALR 669 (1931); *Exchange Bakery v Rifkin*, 245 NY 260, 157 NE 130 (1927), reargument den 245 NY 651, 157 NE 895 (1927); *May's Furs and Ready-To-Wear, Inc. v. Bauer*, 282 NY 331, 26 NE(2d) 279 (1940), reargument den 282 NY 804, 27 NE(2d) 210 (1940), *Strauss v Steiner*, 173 Misc 521, 18 NYS(2d) 395 (1940); *People ex rel. Broder v Heller*, 166 Misc 155, 2 NYS(2d) 352 (1938); *Fairfield v. Friedman*, 14 NYS(2d) 709 (1939). *Contra* *Kraushaar v. Krug*, 16 NYS(2d) 661 (1939); *Bond Stores v. Turner*, 258 AD 760, 14 NYS(2d) 705 (1939).

In *Strauss v. Steiner* (*supra*), the court said: "I regret that I cannot follow the decision of the learned appellate division of the third department (*Bond Stores, Inc. v. Turner*, 258 AD 760, 14 NYS(2d) 705 [1939]) and that of my learned colleague, Daly, J. (*Kraushaar v. Krug*, 16 NYS(2d) 661 [1939]). I think that section 876—a fully defines the situation presented here as a 'labor dispute.' That there is no striking employee at plaintiff's place of business; that the employees are satisfied with their working conditions; and that they have rejected the union, makes no difference."

While, however, picketing in the absence of a strike has been held to constitute a "labor dispute" under the state anti-injunction act (*May's Furs,*

Inc v. Bauer, supra), it has been held that efforts at settlement, generally required by the act in cases involving a "labor dispute" as a condition among others, to the obtaining of injunctive relief against unlawful labor activity, need not be made in the light of the fact that the picketing union does not represent any of the employer's employees. *May's Furs, Inc. v. Bauer, supra*.

Oregon.—*George B. Wallace Co. v. International Assn.* 155 Or 652, 63 P(2d) 1090 (1936); *Blumauer v. M. P. M. O. U.* 141 Or 399, 17 P(2d) 1115 (1933), overruling the following cases: *Heitkemper v. Central Labor Council*, 99 Or 1, 192 P 765 (1920); *Moreland Theatres v. M. P. M. O. U.* 140 Or 35, 12 P(2d) 333 (1932); *Crouch v. Central Labor Council*, 134 Or 612, 293 P 729 (1930). The Wallace case (*supra*) has probably been made bad law in Oregon, by virtue of the adoption in 1939 (L 1939, c 2) of an amendment to the anti-injunction act defining a labor dispute in terms of a quarrel between an employer and a majority of the relevant bargaining unit of his employees.

Wisconsin. — *American Furniture Company v. Teamsters Union Local*, 268 NW 250 (Wis 1938). *Contra*: *Mechanic v. Hoffman*, 10 Law & Labor 83 (Circuit Ct Wis 1928). The American Furniture Company case (*supra*) has probably been repudiated by a 1939 amendment to the anti-injunction act (L 1939, c 25) defining a labor dispute in terms of a controversy between an employer and a majority of the relevant bargaining unit of his employees.

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while fourteen (California, Connecticut, Florida, Georgia, Illinois, Indiana, Kentucky, Maine, Massachusetts, New Jersey, Ohio, Pennsylvania, Texas and Washington)⁴¹ have outlawed it.

41. California.—Smith Metropolitan Market v. Lyons, 12 St Bar Jour 203 (1937); Allen & Huck v. Amalgamated Meat Cutters, 1 CCH Lab Cas 292 (November 3, 1937) *Contra*: Los Angeles Athletic Club v. Local Joint Executive Board, 1 CCH Lab Cas 340 (December 29, 1937); Patterson v. Journeyman Barbers' International Union — (August 23, 1939) But where a dispute exists between the employees of a manufacturer and the manufacturer, the union may picket not only the manufacturer's plant, but also the product itself and the sale thereof at retail establishments. Sunset Poultry Market v. United Cannery Workers, 2 CCH Lab Cas 125 (November 15, 1939).

Reliance is sometimes placed, in connection with holdings that picketing in the absence of a strike or in the absence of a labor dispute between the employer and his employees is illegal and may be enjoined, upon Section 923 of the Labor Code, which contains a declaration of public policy to the effect that individual workmen shall be free from the interference, restraint or coercion of employers of labor in any concerted activities for mutual aid or protection. See Olson v. Bakery Drivers Local — (Super Ct Los Angeles Co July 5, 1940), holding picketing in the absence of a labor dispute between employer and employees illegal because the purpose thereof is to compel an employer to accede to a contract under the terms of which the employer would be required to discharge such of his employees as failed or refused to join the outside labor union, thereby depriving such employees of

their right to bargain freely and collectively, in violation of Section 923 of the Labor Code. See, in this connection, *infra*, section 461. It has been held, with respect to Section 923 of the Labor Code, that nothing therein contained authorizes a court to issue an order directing an employer to bargain collectively with the designated representatives of its employees. Nutter v. Pacific Electric Railway Co. — (Super Ct Los Angeles Co. July 17, 1940).

Connecticut.—Loewe's Enterprise v. International Alliance, — Conn — 6 A(2d) 321 (1939). But this case probably no longer represents the Connecticut Law, in view of the enactment in 1939 of a state anti-injunction act modelled partly after the Norris Act L 1939, c 251. Gen Stats 1939, Supp 1420c-1428c. The definition of the words "labor dispute" in the Act, like the definition of the same term in the Norris Act, is as follows: "The term 'labor dispute' shall include any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee" (L 1939, c 251, Section 1).

Florida.—Paramount Enterprises v. Mitchell, 104 Fla 407, 140 S 326 (1932); Retail Clerks Union v. Lerner Shops, Inc. 103 S 520 (Fla 1939).

Georgia.—Robinson v. Bryant, 181 Ga 722, 184 SW 298 (1936).

Illinois.—Swing v. Am. Fed. of La-

The point of view underlying holdings limiting picket-

bor, 298 Ill App 93, 18 NE(2d) 258 (1938), aff'd 372 Ill 91, 22 NE(2d) 857 (1939); Lawrence Avenue Building Corporation v. Van Heck, — Ill App —, — NE(2d) — (1940); Maywood Farms Co. v. Milk Wagon Drivers' Union, 22 NE(2d) 962 (Ill 1939); Hendrickson v. International Assn 22 NE(2d) 969 (Ill 1939); Jaffe v. Auto Mechanics, 22 NE(2d) 723 (Ill 1939). c/f Schuster v. International Assn. 293 Ill App 177, 12 NE(2d) 50 (1938).

Indiana.—Roth v. Local Union, 24 NE(2d) 280 (Ind 1939) (c/f Scoles v. Helmar, 187 NE 662 [1933]). The Roth case appears to be a plain misinterpretation of the State Anti-Injunction Act which, like the Norris Act, defines a "labor dispute" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

Kentucky.—Hotel Union v. Miller, 272 Ky 466, 114 SW(2d) 501 (1938). c/f Music Hall Theatre v. Moving Picture Machine Operators Local, 61 SW(2d) 283 (Ky 1933).

Maine.—Keith Theatre v. Vachon 134 Me 92, 187 A 692 (1936).

Massachusetts.—Simon v. Schwachman, 18 NE(2d) 1 (Mass 1938), Quinton's Market, Inc. v. Patterson, 21 NE(2d) 540 (Mass 1939); Harvey v. Chapman, 220 Mass 191, 115 NE 304 (1917). c/f Simon v. Hamlin, 1 CCH Lab Cas 672 (1939).

New Jersey.—Gevus v. Greek Restaurant Workers Club, 134 A 309 (NJ 1926); Heine's, Inc. v. Truck Drivers, 127 NJ Eq 514 (1940); Feller

v. I. L. G. W. U. 121 NJ Eq 452, 191 A 111 (1937); Snead & Co v. Local Union, 103 NJ Eq 332, 143 A 331 (1928); Suchodolski v. A. F. L. 127 NJ Eq 511, 14 A(2d) 51 (1940); Mitnick v. Furniture Workers' Union, 124 NJ Eq 147, 200 A 553 (1938), app dis 125 NJ Eq 142, 4 A(2d) 277 (1939) upon the ground that the parties had in the interim effected an adjustment of the controversy. In Thompson v. Delicatessen Workers Union, 126 NJ Fq 110, 8 A(2d) 130 (1939), it was held that the distribution of handbills and the carrying of signs near but not in front of the plaintiff's premises could not be enjoined though the plaintiff had terminated the strike by filling the strikers' places. Such activity, said the Court, did not constitute picketing and the fact that some of the plaintiff's customers were given the handbills the court held to be "merely accidental"

Ohio.—Crosby v. Rath, 136 Oh St 352, 25 NE(2d) 934 (1940); Snapp v. White, 17 Oh Op 186 (1940); La France v. Electrical Workers, 108 Oh St 61, 140 NE 899 (1929); Saltzman v. United Retail Employees, 10 Oh Op 6 (1937), Driggs Dairy v. Milk Drivers, 49 Oh App 303 197 NE 68 (1935); Steinberg v. International Alliance, 13 Law & Labor 66 (Ohio App 1930); United Tailors v. Amalgamated Workers, 26 Oh NP 439 (1927). c/f Finke v. Schwartz, 28 Oh NP (NS) 407 (1931)

Picketing of partners operating a store without employees, for the purpose of compelling them to conform to uniform closing hours on Thursdays and Sundays, was held legal in Evans v. Retail Clerks Union, — LRR — (Ct Com Pls Fairfield County, Ohio 1940), the court citing Senn v. Tile Layers Protective Union, 301 US 468, 57 S Ct 857, 81 L Ed 1229 (1937) for

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ing to furtherance of a strike has been stated in the Massachusetts case of *Simon v. Schwachman*⁴⁸ as follows: "By our common law the right to strike and maintain pickets against an employer is deemed the right of his employees only. Labor unions and other persons helping striking employees do so only in the right and for the benefit of those employees. Each employer and his employees constitute a unit within which a trade dispute must be found in order that picketing and other normally lawful methods of conducting a strike may be employed." In *Keith Theatre v.*

the proposition that picketing in the absence of a strike is legal, and distinguishing *Crosby v. Rath* (supra) upon the ground that the presence of violence was sufficient to justify the injunction order entered in that case. The right to picket was identified with the guarantee of free speech, the court saying "In exercising the right of free speech the defendant has a constitutional right to make known its complaint against plaintiff, in defense of what they have determined to be proper and reasonable hours of labor for those engaged in similar employment, by carrying a banner truthfully informing defendant's union members and the public of the facts, and this Court holds that the defendant may do this regardless of whether there is a trade or labor dispute between the employer and employees." See, for a discussion of the connection of picketing with free speech, *infra*, sections 135-140.

Pennsylvania. — *Flashner v. Amalgamated Meat Cutters*, 1 CCH Lab Cas 1338 (November 3, 1939), construing a 1939 amendment to the Anti Injunction Law defining a labor dispute in terms requiring a dispute between an employer and a majority of his employees. *L. 1939, Act 162*. See, for a contrary holding prior to the 1939 amendment, *Kirmser v. Adler*, 311 Pa St 78, 166 A 546 360

(1933)

Texas. — *Webb v. Cooke Union*, 205 SW 1086 (Tex Civ App 1921); *International Assn v. Federated Assn*, 109 SW(2d) 301 (Texas 1937)

Washington. — *Safeway Stores, Inc. v. Retail Clerks Union*, 184 Wash 322, 51 P(2d) 372 (1935), *Adams v. Building Service Employees Union*, 97 Wash Dec 209, 84 P(2d) 1021 (1938); *S and W Fine Foods v. Retail Delivery Drivers and Salesmen's Union*, 2 CCH Lab Cas 932 (Wash 1940) In *Fornili v. Auto Mechanics Union*, 100 Wash Dec 240, 93 P(2d) 422 (1939), the Court enjoined picketing even though the picketing union had theretofore entered into a collective bargaining agreement with the picketed employer which, upon the expiration thereof, the employer refused to renew. In *United Union Brewing Co. v. Dave Beck*, 100 Wash Dec 412, 93 P(2d) 772 (1939), picketing by one union was enjoined where the employer's employees were all members of another union. In *Adams v. City of Walla Walla*, 82 P(2d) 584 (Wash 1938), it was held that since picketing, whether peaceful or not, was illegal in the absence of a strike, the validity of a municipal anti-picketing ordinance would not be tested under the State Declaratory Judgment Act where no strike existed.

48. 18 NE(2d) 1 (Mass 1938).

Vachon,⁴³ the matter was expressed in the following language: "The employer's right to carry on its lawful business cannot be interfered with without just cause or excuse. As to its own employees, it may be said to have opened the door to negotiations with them, and the door is not closed even after they have gone out on strike. Having taken them into employment, it may be said to have consented by implication to reasonable discussion of their disagreements and possibly even to peaceable picketing, but it contravenes the fact, express or implied, to say that it has made any such concession or surrender to strangers. . . . Social welfare does not demand that nonrelated persons or organizations shall have the right even by peaceable picketing, to attempt to break down and destroy a satisfactory relationship between an employer and its employees in order to supplant it by another whose terms are satisfactory only to the dictators of it." In Ohio, picketing is held illegal if in the absence of a strike, upon the ground, among others, that otherwise "an employer might well find himself . . . picketed by two or more hostile unions with each one insisting that the employer discharge his employees unless they become members of that particular union alone."⁴⁴

The rationale on the other hand, of those cases which permit picketing in the absence of a strike has best been set forth in the New York case of *Exchange Bakery v. Rifkin*.⁴⁵ "The labor organization may be as interested in the wages of those not members or in the conditions under which they work, as in its own members, because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All by the principle of collective bargaining. Economic organization today is not based on the single shop. Unions believe that wages may be increased, collective bargaining maintained, not in some single factory but generally. That they may prevail, it may call a strike, and picket the premises of an employer with the intent of inducing him to employ only union labor.

43. 134 Me 392, 187 A 602 (1936).

45. 245 NY 260, 167 NE 130

44. *Crosby v. Rath*, 136 Oh St 352 (1940).

(1927), reargument den. 246 NY 651. 157 NE 895 (1927).

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And it may adopt either method separately. Picketing without a strike is no more unlawful than a strike without picketing."

Recognition of the legality of picketing in the absence of a strike involves approval of the purpose of picketing not simply as a weapon to be utilized in connection with an existing dispute between the employees of a particular employer, but as a tactic employed in connection with an organizational drive. Thus in *Yonkers New System Laundry, Inc. v. Simon*,⁴⁶ a union which had theretofore lost a State Labor Board election held to determine the union's claim to a majority of the employer's employees, commenced to picket the employer. The employer contended that such picketing was illegal because the union had failed to qualify as his employees' bargaining representative. The court held otherwise, however, saying: "Even though the defendant union has not been designated as the collective bargaining representative of plaintiff's employees, it may still attempt to increase its members among plaintiff's employees."

In 1932, the Norris bill became the federal anti-injunction law, and defined the term "labor dispute" to include a controversy between parties though not standing in the relation of employer and employee.⁴⁷ The Act sired prototype state anti-injunction statutes which likewise widened the meaning of the term "labor dispute," thereby favoring the legality of picketing in the absence of a strike or other labor dispute between employer and employee.⁴⁸ Reversal

46. 103 NYLJ 76 (1940).

47. Act of March 23, 1932, c 90, 47 Stat 70 29 USCA Sections 101-115. By Section 13(c) of the Act, it is provided that the term "labor dispute" includes "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants

stand in the proximate relation of employer and employee." See, for a discussion of the Norris Act, *infra*, chapter fourteen, sections 199-233, and, for a statement of the controversies which have been held to constitute and not to constitute "labor disputes" under the Act, *infra*, sections 208-212.

48. See, for a statement of the states which have enacted such statutes, section 434, *infra*, and for a discussion of the manner in which

of that trend, however, is evidenced by statutes passed in 1939 in the states of Oregon,⁴⁹ Pennsylvania⁵⁰ and Wisconsin,⁵¹ which define a labor dispute in terms of a quarrel between an employer and the majority of his employees.⁵² In New York, it has been held under an anti-injunction act patterned upon the Norris Act, that although picketing in the absence of a strike constitutes a "labor dispute" under the act, no effort at settlement of the controversy need be made as a condition to the obtaining of injunctive relief under the act, in view of the non-representation by the union of any of the employer's employees.⁵³

Section 118. Picketing in the Absence of a Strike—When a Strike Exists.

Courts which hold picketing illegal in the absence of a strike have been called upon to determine whether a strike may be said to exist in a given case. Two rules have thus far been announced, which govern such determination: First, the quitting by a single employee or even of several of many employees does not constitute a strike. There must be a general walkout.⁵⁴ The cases do not give any clear answer, as has been seen,⁵⁵ to the question as to the precise number of employees which need to be involved for a general walkout to exist. Statutes in the states of Oregon, Pennsylvania and Wisconsin, as has been seen,⁵⁶ have introduced the notion that a majority of employees but no less need to walk out for a strike to be said to exist.

such statutes have been construed by the various states, sections 436-450, *infra*.

49. Oregon L. 1939, c. 2.

50. Pennsylvania L. 1939, c. 57.

51. Wisconsin Stats 1939, c. 25.

52. The Wisconsin "Employment Peace Act" (patterned more or less upon the National Labor Relations Act), also proscribes labor activity carried on without majority authorization. Wis Stats (1939), section 111.06 (2e).

53. *May's Furs and Ready to Wear v. Bauer*, 282 NY 331, 26 NE(2d) 279

(1940), reargument den 282 NY 804, 27 NE(2d) 210 (1940).

54. *Gexas v. Greek Restaurant Workers Club*, 98 NJ Eq 770, 134 A 309 (1926); *Saltzman v. United Retail Employees*, 10 Oh Op 6 (1937); *Moreland Theatres v. M. P. M. O. U.* 140 Or 35, 12 P(2d) 335 (1932). In *Woodbridge v. Weudrich* (NJ Ch 1939), employees, though members of a union, refused to obey a strike call. Picketing was consequently enjoined.

55. See *supra*, section 81.

56. See *supra*, section 117,

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Second, a strike is deemed terminated where the strikers' places have been taken by other workers or the business operations are continued or resumed.⁵⁷ The rule holding a strike terminated and hence picketing illegal where the strikers' places have been taken by other workers or the business operations are continued or resumed, seems to have originated in lower federal court holdings interpreting the Clayton Act, which was limited in application to cases involving the relationship of employer and employee.⁵⁸ "When a lawful strike has become merely nominal," it has been said,⁵⁹ "without substantial effect upon the business of the employer or genuine hope of success, a trade dispute ceases to exist, and justification for interference with the business of the employer ends, even though a labor union wishes to continue picketing for the purpose of coercing

57. *Samuel Hertzog Corporation v. Gibbs*, 295 Mass 229, 3 NE(2d) 831 (1936); *M. Steinert & Sons v. Tegen*, 207 Mass 394, 93 NE 584 (1911); *Moore Drop Forging Co. v. McCarthy*, 243 Mass 554 (1923). c/f *Densten Hair Co. v. McCarthy*, 243 Mass 554 (1923); *Mode Novelty Co. v. Samuel Taylor*, 122 NJ Eq 593, 195 A 819 (1937); *Gexas v. Greek Restaurant Workers Club*, 99 NJ Eq 770, 134 A 309 (1926); *Thompson v. Delicatessen Workers Union*, 126 NJ Eq 110, 8 A (2d) 130 (1939); *Moreland Theatres v. M. P. M. O. U.* 140 Or 35, 12 P (2d) 333 (1932); *West Allis Foundry Co. v. State*, 186 Wis 24, 292 NW 302 (1925). See also *Quinlivan v. Dail Overland*, 274 F 56 (CCA 6, 1921); *Loewe's Enterprise v. International Alliance*, 6 A(2d) 321 (Conn 1929). (But this case probably no longer represents the Connecticut law in view of the enactment in 1939 of a state anti injunction statute modelled partly after the Norris Act (L 1939, c 251, Gen Stats 1939, supp 1420c-1428c); *Blumauer v. Portland Union*, 141 Or 399, 117 P(2d) 1115 (1933). *Contra*: *Shapiro v. Amal-*

gamated Watchmakers Union (Superior Ct Los Angeles Co January 25, 1940)

Prior to the time when the New York courts recognized the legality of picketing in the absence of a strike (*Exchange Bakery v. Rifkin*, 245 NY 260, 157 NE 130 [1927], reargument den. 245 NY 651, 157 NE 885 [1927]), the New York courts also subscribed to the rule holding picketing enjoined where a strike had been terminated by filling the strikers' places (*Yates Hotel Co. v. Meyers*, 195 NYS (1922); *Berg Auto Trunk & Specialty Co. v. Wiener*, 121 Misc 796, 200 NYS 745 (1923); *Russel Hotel Co. v. Obermeier*, NYLJ May 10, 1924, p. 583).

58. *Quinlivan v. Dail-Overland Co* 274 F 56 (CCA 6, 1921). See also *Canoe Creek Coal Co. v. Christensen*, 281 F 559 (DCWD Ky 1922) rev'd on another ground sub nom. *Sandefur v. Canoe Creek Coal Co.* 293 F 379 (CCA 6, 1923), 266 US 42, 45 S Ct 18, 69 L Ed 162, 35 ALR 451 (1924).

59. *Simon v. Schwachman*, 18 NE (2d) 1 (Mass 1938).

the employer to enter into a new contract with it.”⁶⁰ It has also been held that a strike is deemed terminated and picketing consequently enjoined, where four years have elapsed since the date of the strike.⁶¹ In *Miller's Inc. v. Journeymen Tailors Union*,⁶² the employer discharged an employee engaged pursuant to a contract with the C. I. O. at the termination of the contract, and employed in his stead an A. F. L. member, pursuant to a contract with the A. F. L. The C. I. O. former employees, alleging a lockout, picketed the employer's premises. An injunction issued, the court holding that no strike existed.

In Washington it has been held that picketing is illegal though legal when commenced where it has ceased temporarily.⁶³ The question as to how long a strike may be considered to continue to exist was also raised in *West Allis Foundry Co. v. State*,⁶⁴ where the defendant resisted conviction under a statute requiring employment advertisements to state the existence of a strike. It appeared that a strike had been called four months prior to the date when the advertisement was made, but that in the interim only a single striker picketed and received strike benefits from the union, that the other strikers had obtained employment elsewhere, that the employer's business had not only withstood the strike but had subsequently increased in volume. The court held that the defendant could not be convicted under the statute, since in the absence of a definition of a strike in the statute the defendant was justified in believing that the strike had been terminated. A dissenting opinion, however, insisted to the contrary: “The real test of a strike must be: Are the usual concomitants of a strike still attached to the situation; are the men still out; are pickets kept up; are the union and union papers still publishing notices of the strike; is pressure still maintained on the em-

60. *Citing Samuel Hertzog Corporation v. Gibbs*, 295 Mass 229, 3 NE (2d) 831 (1936).

61. *Waitresses' Union v. Benish Restaurant Co.* 6 F(2d) 568 (CCA 8, 1925).

62. 2 CCH Lab Cas 393 (NJ Ch February 6, 1940).

63. *Fornili v. Auto Mechanics Union*, 100 Wash Dec 240, 93 P(2d) 422 (1939).

64. 186 Wis 24, 202 NW 302 (1925).

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ployer by which he is burdened financially, or physically or mentally impressed; are men prevented from accepting employment at the plant by reason of the conditions existing with reference thereto; are strike benefits still being paid; is the action of the employees or the union in their behalf, to maintain the strike, in good faith, with some hope of ultimate success? If any or all of these questions may be answered in the affirmative, there is some evidence of a strike actually existing."⁶⁵

Section 119. Picketing in the Absence of a Strike—Criticism of Rule Holding Strike Terminated upon Filling of Strikers' Places.

The rule holding a strike to be terminated and picketing consequently enjoined, where the strikers' places have been taken by others or the business operations are continued or normally resumed, offends both logic and simple social policy. In the first place, emphasis is mistakenly shifted from the issues involved to the circumstances of the parties. Secondly, the rule constitutes a prelude to violence by encouraging the employment of strikebreakers.⁶⁶ Thirdly, it places a weapon in the employer's hands which impedes peaceful negotiation and the settlement of the underlying controversy. Thus in *Russel Hotel Co. v. Obermeier*,⁶⁷ at a time when the New York courts subscribed to the rule that picketing was illegal in the absence of a strike, an employer locked his employees out in antici-

65. The difficulty of determining whether a strike exists in the given case enhances the uncertainty involved in applying general legal doctrines to several situations, such as cases having to do with unemployment insurance benefits (see *supra*, section 44), false bannering (see *infra*, section 126) and statutes prohibiting non-disclosing advertisements for replacing employees by an employer against whom a strike has been called (see *supra*, section 80).

66. See *Shapiro v. Amalgamated Watchmakers' Union*, 2 CCH Lab Cas 222

222 (Super Ct Los Angeles 1940). "It seems to me that if a strike can thus be terminated, that it would put the laborer and the employer back to the old tests of strength of clubs and imported strikebreakers which led to all the incitements which in our past history have produced so much violence, bitterness and hatred, when each of the parties depended for their ability to win a dispute upon their mere economic strength, economically and physically to defeat the other side."

67. NYLJ May 10th, 1924, p. 533.

pation of a strike. Picketing was thereupon enjoined. In the fourth place, the rule smacks of basic hostility to all efforts of labor unions. If the strike has lost "substantial effect" upon the employer's business, what necessity is there for the employer to resort to the expense of an injunction proceeding to restrain picketing? Courts which subscribe to the rule seem to say to the employer: if you hold out long enough, we will restrain picketing injurious to your business, upon the theory that it is no longer injurious. Lastly, the rule looks to the activities of the employees to determine the legality of picketing, while at the same time looking to the activities of the employer to determine its illegality. In *Tankin v. Hotel & Restaurant Workers Union*,⁶⁸ the court more properly, it seems, conceived the notion of a continuing strike in the following language: "A strike is a combined effort of employees to obtain more desirable terms or conditions of employment by a cessation of work at a preconcerted time and continuing thereafter until an adjustment or settlement has been effected, or until an abandonment occurs. Even though there is a resumption of operations without such adjustment, those employees who do not return to work are still entitled to the classification of striking employees."

The Restatement of the Law of Torts⁶⁹ has taken to task the rule holding a strike to be abandoned where the workers' places have been filled or the employer's business continues to operate normally in spite of the strike. The Restatement holds that "The strike continues so long as the workers have not abandoned it by taking permanent employment elsewhere or otherwise, even though the employer has filled their places and is operating at normal capacity. When workers are still continuing their concerted strike activities and their efforts to prevent normal operations, their replacement cannot be regarded as permanent. It is probably true today that most men taking jobs so made vacant realize from the outset how tenuous is their hold.

68. 36 Pa D & C 537 (1939).

69. Rest., Torts (1939) Section 776, comment b.

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On the other hand, the mere fact that a strike or lockout has not been officially called off, as by a union vote or other declaration, is not conclusive evidence of its continued existence. It may be abandoned without such official action. The issue is one of fact: in the case of a strike whether or not the employees are still seeking by concerted action to return to their work and achieve some or all of their demands."

Section 120. Picketing in the Absence of a Strike—The Notion of Malice Criticized.

Because the rule holding further picketing illegal where the strikers' places have been taken or the business has been continued or resumed, is recognized only in jurisdictions holding picketing in the absence of a strike illegal, the cases applying the rule are viewed simply as involving the problem: when may a strike be said no longer to be a strike so as to stamp as unjustified any further picketing? It should, however, be said in all justice to the rule that another rationale is in part responsible for it which, though probably as baseless as the first method of reasoning, possesses a germ of reasoning which must be considered. According to this rationale, it is contended that when picketing continues for an inordinate length of time, such as for years, or where the business continues apparently unhindered or even becomes more active and more profitable after the strike and picketing commence, further picketing is simply reflective of vindictiveness, which, like any other form of malicious activity, ought to be enjoined from further exercise. Thus in *Simon v. Schwachman*,⁷⁰ the court emphasized the fact that there was no longer any "genuine hope of success" while in *Loew's Enterprise v. International Union*,⁷¹ it was said that "the mere fact that the employer has been able to secure and maintain a full complement of employees and to operate his plant normally would not of

70. 18 NE(2d) 1 (Mass 1938).

71. 125 Conn 391, 6 A(2d) 422 (1939). The case probably no longer represents the Connecticut law in view

of the enactment in 1939 of a state anti-injunction act modelled partly after the Norris Act (L 1939, c 251; Gen Stat 1939, supp 1420c-1423e).

itself justify a conclusion that the picketing had become unjustifiable, if he still continued to suffer seriously from loss of patronage."⁷² Now of course it is undoubtedly true, as stated in *Al Rashid v. News Syndicate Company*,⁷³ that "even a lawful act done solely out of malice and ill-will to injure another may be actionable" but in *Beardsley v. Kilmer*⁷⁴ it was indicated that there is a limitation upon the operation of the malice rule to the extent that it must be found that the act complained of was "solely the conception and birth of malicious motives unmixed with any other and exclusively directed to injury and damage of another." Courts holding further picketing illegal upon the ground of malice where the business picketed continues nevertheless to continue and to thrive must consequently be criticized for making no careful inquiry into the existence of malice and the evidence to support a finding of malice. Moreover, to the extent that these courts presume malice under such circumstances, they constitute themselves arbiters to determine the strikers' chances of success, and create a statute of limitations governing picketing in labor disputes.

Section 121. Picketing in the Absence of a Strike—Limitations in States Which Generally Permit Such Picketing.

Even courts which permit picketing in the absence of a strike have refused to extend the doctrine to the case where the owner runs the business alone, whether before union intervention or as a result thereof, as where a single employee is discharged because of union demands, without a substitute being employed to take his place, the owner electing to operate his business alone.⁷⁵

72. See also *McPherson Hotel Co v. Smith*, 127 NJ Eq 167, 12 A(2d) 136 (1940); *Newark Int'l Baseball Club*, 120 NJ Eq 520, 10 A(2d) 274 (1940).

73. 265 NY 1, 191 NE 713 (1934).

74. 236 NY 80, 140 NE 203 (1923).

75. *Robble v. Dighton*, 27 F Supp 149 (DCWD Mo WD 1939); *Hughes*

v. M. P. M. O. U 282 Mo 304, 221 SW 95 (1920); *Roraback v. M. P. M. O. U*, 140 Minn 481, 168 NW 766 (1918); *Campbell v. M. P. M. O. U*, 151 Minn 220, 186 NW 781 (1922); *Thompson v. Boeckhout*, 273 NY 390, 7 NE(2d) 674 (1937); *Bieber v. Bininbaum*, 168 Misc 943, 6 NYS(2d) 63 (1939); *Pitter v. Kaminsky*, 7 N

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The New York Court of Appeals has drawn a distinction, however, between the case on the one hand where the owner operates the business himself after a strike has been declared by his employee or employees and the case, on the other hand, where the owner has operated his business alone and without the aid of employees even before union intervention. In the former case picketing is permitted, while in the latter case picketing is illegal. In *Bailis v. Fuchs*,⁷⁶ the plaintiff's employees struck, whereupon the employer elected to carry on the business alone and without the aid of employees. Upon the commencement of picketing, the owner of the business and former employer sought an injunction alleging that under the settled New York law picketing was not permitted where the owner carries on the business alone. The Court of Appeals denied the application for an injunction. "In the present case," said the court, "the drivers were in the plaintiff's employ when the strike was called, and the strike related to the terms of employment. There can be no question, therefore, of the existence of a 'labor dispute' and of the application of section 876-a of the Civil Practice Act." The case, said the court, was different from that involving the discharge by an employer of his employee or employees before a strike is called.

In several cases it has been indicated that picketing might be permitted where the evidence indicates that the owner

YS(2d) 10 (1938); *Miller v. Fish Workers Union*, 170 Mac 713, 11 NYS (2d) 278 (1930); *Wohl v. Bakery and Pastry Drivers and Helpers Local*, 259 AD 668, 19 NYS(2d) 811 (1940), aff'g 14 NYS(2d) 198 (1939); *Simon v. Boris*, 101 NYLI 361 (1939); *Lyons v. Meyerson*, 18 NYS 2d 363 (1940); *Leach v. Himmelfarb*, 18 NYS(2d) 642 (1940); *Zweibon v. Goldberg*, 20 NYS(2d) 272 (1940); *Lyle v. Amalgamated Meat Cutters*, 124 SW(2d) 701 (Tenn 1939). *Contra* *Finke v. Schwartz*, 28 Oh NP (NS) 407 (1938); *Senn v. The Layers Union*, 222 Wis 383, 208

NW 270 (1936), aff'd 301 US 468, 57 S Ct 857, 81 L Ed 1229 (1937) (but a 1939 amendment to the Wis Anti-Injunction Act has probably repudiated the *Senn* case. See *infra*, section 450). See also *Zant v. Building Trades Council*, 172 Wash 448, 20 P(2d) 580 (1933) and see *Jensen v. St. Paul Moving Picture Machine Operators Union*, 184 Minn 58, 259 N W 811 (1935) with which compare *Scott Stafford Co. v. Minneapolis Musicians*, 118 Minn 410, 136 NW 1002 (1912).

76. 283 NY 133, 27 NE(2d) 812 (1940).

intends to fill the discharged employees' places upon the termination of the picketing rather than permanently to conduct his business without an employee.⁷⁷ In *Marvin v. Frisch*,⁷⁸ the court went even further in applying the rule now in force in New York lower courts, holding picketing permissible where, even though the single employee is discharged without intention of hiring a substitute, such discharge was prompted by the employer's desire "to avoid the results of unionization and collective bargaining." This extension is inconsistent with those New York cases which hold picketing illegal to protest the employer's closing down of his business regardless of the motive which prompted the employer to do so⁷⁹ but it is consistent on the other hand with State and National Labor Relations Acts decisions which hold closing down of a business to avoid collective bargaining an unfair labor practice.⁸⁰ In *Leach v. Himmelfarb*,⁸¹ the union contended that the owner of the picketed drug store had refrained from rehiring his discharged drug clerk not because of general business conditions, but because the picketing had been so effective as to make severe inroads upon the plaintiff's business. However, the court held that "under the circumstances presented" picketing would be enjoined, without explaining what was meant by the "circumstances presented." The question as yet unanswered is whether there is persuasive merit in the union's contention, or whether picketing will be enjoined under the circumstances even where the facts are shown to be as contended for by the union.

Where the former employer is a member of a business association involved in a labor dispute, it has been held that

77. *Gips v. Osman*, 170 Misc 53, 9 NYS(2d) 828 (1939); *Bailis v. Doe*, 101 NYLJ 1419 (1939), *Dener v. Jones*, NYLJ May 24, 1939.

78. 102 NYLJ 535 (1939).

79. *Paul v. Mencher*, 169 Misc 657, 7 NYS(2d) 821 (1938), *aff'd* 254 AD 851, 6 NYS(2d) 379 (1938); *Wishny v. Jones*, 169 Misc 459, 8 NYS(2d) 2 (1938).

80. See *Somerset Shoe Company*, 5 NLRB p. 70 (1936). See, on the general problem of lockout, shutdown or removal of plant under the National Labor Relations Act, for the purpose of avoiding collective bargaining or otherwise to forestall union organization, *infra*, sections 284, 321.

81. 18 NYS(2d) 642 (1940).

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picketing is permitted.⁸² It has also been held that a manufacturer, though having no employees of his own, may be picketed upon proof that the manufacturer's independent contractor is engaged in a labor dispute with his employees, where many years of collective bargaining in the industry have created a custom imposing an obligation upon the manufacturer for the labor conditions of his independent contractor.⁸³

Even courts which generally permit picketing in the absence of a strike have refused to extend such permission to cases where the owner runs the business in conjunction with his family, or a partner or partners,⁸⁴ unless the business is carried on in corporate form,⁸⁵ or the partnership is found to be a veil for the purpose of concealing an employer-employee relationship.⁸⁶

⁸² *Schwartz v. Fish*, 170 Misc 566, 11 NYS(2d) 283 (1939).

⁸³ *Sherman v. Abeles*, 171 Misc 1042, 14 NYS(2d) 252 (1939).

⁸⁴ *Luft v. Flove*, 270 NY 640, 1 NE(2d) 369 (1936); *Yablonowitz v. Korn*, 295 AD 440, 199 NYS 769 (1923); *Miller v. Fish Workers Union*, 170 Misc 713, 11 NYS(2d) 278 (1939); *Pitter v. Kaminsky*, 7 NYS(2d) 10 (1938); *Leach v. Himmelfarb*, 18 NYS(2d) 642 (1940); *Botnick v. Winokur*, 7 NYS(2d) 6 (1938); *Lyons v. Meyerson*, 18 NYS(2d) 363 (1940). "If in his own business a man desires to labor long hours and exhaust himself, no one can complain and the labor union may not paternalistically compel him, even if it is for his own good and advantage, to change his course by employing others. . . . The fact that by doing all the work themselves, these plaintiffs are enabled to have a commercial advantage over their competitors who do employ outside help in furtherance of their business cannot affect the decision of law herein involved." *Lyons v. Meyerson*, *supra*.

⁸⁵ *Boro Park Sanitary Live Poul* 272

try, Inc. v. Heller, 280 NY 481, 21 NE(2d) 697 (1939). Immediately upon the handing down of the decision by the Court of Appeals, the corporation was dissolved and the mother and her four sons, who had theretofore done business in corporate form, commenced doing business as a partnership, and brought suit to enjoin the picketing. The injunction was granted at special term. *Kishnar v. Heller*, 14 NYS(2d) 595 (1939). On appeal the Appellate Division, Second Department, in 258 AD 751, 804, 15 NYS(2d) 451 (1939) dissolved the injunction "without prejudice to a renewal of the application for a temporary injunction if defendant does not serve an answer" because "the plaintiffs are conducting their business in violation of the Sanitary Code of the City of New York, N. Y. Code of Ord c 20, sections 19, 321, 325."

⁸⁶ *Saito v. Waiters and Waitresses Union*, 12 NYS(2d) 283 (1939); *Mananti v. Venti*, 103 NYLJ 2666 (1940). See also *People v. Curiale*, 171 Misc 264, 12 NYS(2d) 464 (1939) where the defendant, charged with

Finally, picketing is not permitted, even in jurisdictions which generally recognize the legality of picketing in the absence of a strike, where the owner decides to liquidate his business."

Section 122. Secondary Picketing—Sources of Confusion.

The employment of the term "secondary" as applied to the strike upon the one hand, and the picket and boycott upon the other, illustrates the unfortunate use of a single word to express two entirely different notions. In both cases, to be sure, the activity transcends a primary dispute having reference to the terms and conditions of employment between the employee and the person (usually but not necessarily an employer, as where a small business man sells merchandise manufactured under non-union conditions) picketed or boycotted. Beyond that point, however, the common ground ends. A secondary strike exists where employees in concert refuse to assist or cooperate with the allegedly unfair employers or their product. It is the absence of this connection between employment and product which characterizes the sympathetic as distinguished from the secondary strike. A secondary striker would, if he were to refuse to strike or to continue to strike, be a strikebreaker (if the primary dispute involved a strike) or the active aider of an unfair labor practice (if the primary dispute did not involve a strike). A secondary strike involves activity not by those engaged in the primary labor dispute but by

violation of a statute requiring employers to keep minimum wage records of employees' wages, asserted that his employees were not employees at all, but partners. The defendant was found guilty as charged. Said the court: "The defendant by the preparation of these so called partnership agreements, was in effect making a mockery of the minimum wage law, and it is the barest sort of subterfuge."

57. *Paul v. Mencher*, 169 Misc 657, 7 NYS(2d) 821 (1938), *aff'd* 254 AD 851, 6 NYS(2d) 379 (1938), *Wishny*

v. Jones, 169 Misc 459, 8 NYS(2d) 2 (1938). A federal court case held *Contra Diamond Full Fashioned Hosiery Co. v. Leader*, 20 F Supp 467 (DCED Pa 1937), but in *Russell v. United States*, 86 F(2d) 389 (CCA 8, 1936), the Circuit Court of Appeals for the Eighth Circuit refused to extend the practice of picketing under such circumstances, where the property was in the hands of a United States Marshal for purposes of execution. See also *Grace Co. v. Williams*, 96 F(2d) 478 (CCA 8, 1938).

those, rather, connected therewith through product or employment. Secondary picketing, on the other hand, involves the activity of those engaged in the primary labor dispute. The picketing or boycotting is said to be secondary when the employees engaged in the primary dispute extend their activity so as to exert pressure upon their employer's vendee. Failure to resort to the secondary picket or boycott obviously concerns mainly the pickets or boycotters and the success of their cause. They can in no sense be termed strikebreakers or active participants in an unfair labor practice. Both the definitions and consequences of the secondary strike are so entirely dissimilar from the secondary picket and boycott as to call for clarification of the circumstance which is alleged to justify the one or the others. Secondary strikers insist upon a right to strike upon the ground that they would otherwise be condemned as strikebreakers or active abettors of a primary unfair labor practice. Secondary pickets and boycotters, on the other hand, justify their activities upon the theory that their allegedly unfair employer's vendee becomes a party to the unfairness by seeking to profit thereby. It is for this reason that threat to refuse or the actual refusal by workingmen to work on materials manufactured or shipped through aid of allegedly unfair labor conditions should be (and in this work is classified)⁸⁸ as the case of a secondary strike and not as presently considered, a secondary boycott.⁸⁹

Section 123. Secondary Picketing—Legality.

The legality of the secondary picket has been denied wherever the question has arisen.⁹⁰ There can be found no

88. See *supra*, section 103.

89. See *supra*, section 103, and *infra*, section 145.

90. California.—*Citizen News Company v. Connolly*, 1 CCH Lab Cas 672 (Sup Ct Los Angeles Co 1939). *Sontag v. Connolly*, 1 CCH Lab Cas 589 (Sup Ct Los Angeles Co 1935). *Bulletin Pub. Co. v. O'Connor*, 1 CCH Lab Cas 1309 (Sup Ct Los Angeles Co 1934).

1939). But see *Sunset Poultry Market v. United Cannery Workers*, 2 CCH Lab Cas 125 (1939). An employer engaged in the primary dispute may enjoin secondary picketing where the employer is under contract with the person or persons picketed. *Bulletin Pub. Co. v. O'Connor*, *supra*.

Colorado. — *Perry Truck Lines v.*

split in the authorities with respect to the permissible exercise of the secondary picket, such as has been occasioned by the secondary strike.⁹¹ Labor's assertion of a right to follow the beneficiary of the product manufactured or the service rendered under allegedly unfair labor conditions has as yet fallen upon the deaf ears of the American judiciary. The disparity is particularly striking in view of the fact that the law generally recognizes no absolute right to strike but rather one whose legality is dependent upon purpose, thereby subjecting the strike and the picket to precisely the same legal analysis. In point of logic, then, there seems no basis for the present law in the United States which holds predominantly that strike action may be directed against a third party because of the proximity of economic interest, while picketing may not similarly be directed. In four states, however, New York, California, Louisiana, and possibly Indiana, the ban against secondary picketing is a qualified one.⁹²

International Brotherhood of Teamsters v. CCH Lab (as 1292 (Denver Co Ct 1939).

Illinois. -- *Meadowmoor Dairies v. Drivers' Union*, 371 Ill 377, 21 NE (2d) 308 (1939), cert. den 308 US 596, 60 S Ct 128, 84 L Ed 221 (1939). *Ellingsen v. Milk Wagon Drivers' Union*, -- NE(2d) -- (Ill 1940). *Maywood Farms Co. v. Milk Wagon Drivers' Union*, 22 NE(2d) 962 (Ill 1939).

Indiana. -- *Muncie Building Co. v. Umbarger*, 17 NE(2d) 828 (Ind 1938).

New Jersey. -- *Evening Times Pub Co. v. Am. Newspaper Guild* 122 N1 Eq 545, 199 A 598 (1938), mod 124 NJ Eq 71, 199 A 598 (1938). *Mitnick v. Furniture Workers' Union*, 124 N1 Eq 147, 200 A 553 (1938), appeal dismissed 125 NJ Eq 142, 4 A(2d) 271 (1939) (upon the ground that the parties had in the interim effected an adjustment of the controversy); *Fink & Son v. Butchers Union*, 84 NJ Eq 638, 95 A 182 (1915); *Van Buskirk*

v. Sign Painters' Local, 127 NJ Eq 533, 14 A(2d) 45 (1940).

Ohio. -- *Meyer Packing Co. v. Butchers Union*, 18 Ohio NP(NS) 457 (1917); *Driggs Dairy Farms Inc. v. Milk Drivers Union*, 49 Ohio App 303, 197 NE 250 (1935).

Pennsylvania. -- *Alliance Auto Service v. Cohen*, 35 Pa D & C 373 (1939); *Stein v. McNeil*, 87 PLJ 39 (1938); *York Mfg. Co. v. Oberdick*, 10 Pa Dist 463 (1901).

Washington. -- *United Union Brewing Co. v. Dave Beck*, 100 Wash Dec 412, 93 P(2d) 772 (1939).

West Virginia. -- *Parker Paint & Wall Paper Co. v. Local Union*, 87 W Va 631, 105 SE 911 (1921).

91. See *supra*, section 103.

92. In *Wilson & Co. v. Birl*, 105 F (2d) 948 (CCA 3, 1939), secondary picketing was held to constitute a "labor dispute" under the Norris Anti-Injunction Act, so as to be immune from injunctive relief except in

Though the secondary picket was formerly in New York as unlimitedly illegal as everywhere,⁹³ the rule in that state has now developed that picketing the premises not of the allegedly unfair employer but of his vendee is legal, provided the picketing is directed against the product sold or distributed at the vendee's establishment. In *Goldfinger v. Feintuch*,⁹⁴ where the New York Court of Appeals first announced a modification of the former rigor in the rule denying any legality to the secondary picket, the court indicated the reason for its holding as follows: "Where a manufacturer pays less than union wages, both it and the retailer who sells its product are in a position to undersell competitors who pay the higher scale, and this may result in unfair reduction in the wages of union members." Although the quoted language would seem reasonably to justify the inference that the decision had recognized the non-neutral

accordance with the provisions of the Act.

So also in *Consolidated Terminal Company v. Drivers Local Union* — *F Supp* — (DCD Col 1940) it was held that picketing of the premises of a retailer selling the product of a manufacturer involved in a labor dispute with the picketing union was a "labor dispute" under the Norris Act, the court noting a 'unity of interest' between the allegedly unfair manufacturer and the retailer.

But in *Lake Valley Farm Products, Inc. v. Milk Wagon Drivers' Union*, 108 F(2d) 436 (CCA 7, 1939), picketing of retail stores which sold milk purchased from a dairy company with whom the picketing union was engaged in a controversy was held not within the Norris Act, and enjoined as an illegal restraint in violation of the Sherman Act, where (1) the purpose of the picketing is to compel the dairy company to distribute milk through members of the picketing union instead of through independent contractors, and (2) such

independent contractors were not eligible for membership in the union unless they gave up their business as independent contractors. See also *Fehr Baking Co. v. Bakers' Union*, 20 F Supp 691 (DC WD La Lake Charles Division 1937).

93. *Grandview Dairy v. O'Leary*, 158 Misc 791, 285 NYS 841 (1936); *Stuhmer v. Korman* 241 AD 702, 269 NYS 788 (1934), *aff'd* 265 NY 481, 193 NE 281 (1934).

94. 276 NY 281, 11 NE(2d) 910, 116 ALR 477 (1938). *Accord* *Chapman v. Doe*, 255 AD 893, 7 NYS(2d) 470 (1938), *reargument denied* 255 AD 919, 8 NYS(2d) 126 (1938); *Blumenthal v. Weikman*, 154 Misc 684, 277 NYS 895 (1935), 241 AD 721, 270 NYS 966 (1937). See *People v. Bellows*, 281 NY 67, 22 NE(2d) 238 (1939) holding peaceful secondary picketing unconnected with the sale or distribution of a product punishable as disorderly conduct. See also *Grandview Dairy, Inc. v. O'Leary*, 158 Misc 791, 285 NYS 841 (1936).

character of the non-unionized manufacturer's vendee to the effect that secondary picketing might generally be held legal, the court was quick to state, and later to hold, that where the picketing is directed against the vendee rather than strictly against the product sold or distributed by him, the picketing would be enjoined. As a consequence, two distinctions have been drawn by the New York courts between the permissible and the unlawful. The first has reference to the picketing of an ultimate consumer in contrast to an intermediate distributor. Picketing is held to be illegal in the former case only.⁹⁵ Thus in *American Gas Stations v. Doe*,⁹⁶ the court enjoined the picketing by a sign painting union of a gas station which had purchased a sign painted by non-union labor, upon the ground that the gas station was the ultimate user of the sign, and was not engaged in selling or distributing the same. In *Hydrox Ice Cream Co. Inc. v. John Doe*,⁹⁷ the same court held picketing permissible where the plaintiff, an ice cream distributor, sold or furnished his customers with signs painted under non-union conditions, in consideration for their patronage. But picketing of an employer by employees who struck because he installed and was maintaining an electric burglar alarm system by non-union labor has been held illegal.⁹⁸ The second line of distinction holds any but primary picketing illegal where a service (such as window cleaning) is supplied by the allegedly unfair employer to the party sought to be

95 But see *Long Island Drug Co. v. Devery*, 6 NYS(2d) 390 (1934). Secondary picketing is illegal even though connected with the sale or distribution of a product, where the picketing is carried on for an unlawful purpose. *Wohl v. Bakery and Pastry Drivers Local*, 259 AD 808, 19 NYS(2d) 811 (1940), aff'g 14 NYS(2d) 198 (1939).

96 250 AD 227, 293 NYS 1019 (1937).

97 250 AD 770, 293 NYS 1013 (1937). The *Goldfinger* case (*Goldfinger v. Feintuch*, 276 NY 281, 11 NE(2d) 910, 116 ALR 477 [1938])

was cited with approval by the Court of Appeals in *Canepa v. Doe*, 277 NY 55, 12 NE(2d) 790 (1938) and the line of distinction therein made reiterated by more recent Supreme Court decisions in *Witkin v. Kirman*, NYLJ April 29, 1939, p. 1976, per Miller, J.; *Weil v. Doe*, 163 Misc 211, 5 NYS(2d) 559 (1938); *Delancey Drug v. Doe*, NYLJ February 28, 1939, per Steuer, J.; *Silverglate v. Kirkman*, 171 Misc 1051, 12 NYS(2d) 505 (1939).

98 *Katzman & Co. Inc. v. Kirkman*, 103 NYLJ 380 (Sup Ct NY Co Jan. 24, 1940).

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picketed, and where consequently no product is involved. It is the present New York law that under such circumstances, pickets may not call attention in any manner to the identity of the person picketed." It has however, been held that a manufacturer whose independent contractor is engaged in a labor dispute with his employees may be picketed where collective bargaining in the industry over a period of years has created a custom imposing an obligation upon the manufacturer for the conditions under which the contractor's employees are employed. And in *Manhattan Steam Bakery Inc. v. Schindler*,¹ retail stores were permitted to be picketed by members of a drivers' union employed by the retail stores' vendor, with signs reading "this store receives rolls and bread delivered by non-union drivers." But in *Chapman v. Doe*² it was held illegal to picket a restaurant selling union-made beer, where the basis of picketing was the fact that the beer was delivered to the restaurant in trucks driven by a non-union chauffeur. It has recently been held that picketing of a unionized manufacturer by those engaged in a labor dispute with the manufacturer's non-union vendee is illegal.³ That the line of demarcation between the retailer and the consumer is not always easy to draw was illustrated in *Back v. Kaufman*⁴. In that case a dentist was picketed by a dental laboratory employees union, in an effort to compel him to refrain from purchasing materials from the dental laboratory with whom the union had a dispute. That the dentist bought the ma-

89. *Spanier Window Cleaning Co. v. Awerkin*, 225 AD 735 (1935); *Commercial Window Cleaning v. Awerkin*, 138 Misc 512, 240 NYS 797 (1930). See also *Katzman v. Kirkman*, 18 NYS(2d) 303 (1940). Secondary picketing was also held illegal in *Mlle. Reif Inc. v. Randau*, 166 Misc 247, 1 NYS(2d) 515 (1937); *Gertz v. Randau*, 162 Misc 796, 205 NYS 671 (1937). *Contra*: *Daveza City Radio Inc. v. Randau*, 166 Misc 246, 1 NYS(2d) 514, where secondary picketing was held to come within 378

the purview of the term "labor dispute" as employed in Civil Practice Act, § 876A (prototype of the Norris Act).

1. 250 AD 467, 294 NYS 783 (1927).

2. 255 AD 603, 7 NYS(2d) 470 (1938) rearg. den 255 AD 919, 8 NYS(2d) 126 (1938).

3. *Feldman v. Weiner*, NYLJ February 21, 1939, p. 815, Sup Ct NY Co per Rosenman, J.

4. 103 NYLJ 5020 (Sup Ct Bronx Co, per Schmuck, J., 1940).

terials and in turn used them in connection with his profession could not be denied. But the court took the view that the dentist was the consumer of the materials and not the retailer thereof; the materials were incidental to the dentist's rendition of professional services. Hence picketing under the circumstances was held illegal.

California's case holding secondary picketing legal, if directed against the product and not against the person selling it, is *Sunset Poultry Market v. United Cannery Workers*.⁵ In Louisiana, secondary picketing was held legal in *Johnson v. Milk Drivers & Dairy Employees Union*,⁶ provided the union is engaged in following the product of the allegedly unfair employer. The court in the Louisiana case cited in support of its holding the case of *Goldfinger v. Feintuch*,⁷ and approved of the notion of "unity of interest"⁸ therein announced. The Louisiana Court thus distinguished between "secondary picketing" which was legal, and a "secondary boycott" which was illegal: "In every case which we have read holding a 'secondary boycott' existed, the facts showed that trade or commerce in general was attempted to be stopped. If these defendants were by circulars, signs and conduct charging the petitioner as being unfair to organized labor and soliciting their friends from patronizing this business, then we would have the situation usually termed a 'secondary boycott.' As we have heretofore stated, this is not being done by these defendants. They are merely pursuing the product of their employer and advertising in a manner and method authorized by the provisions of Act 203 of 1934."

Indiana's case in point is *Wiest v. Dirks*,⁹ where the defendant sought to coerce signature by a dairy products company of a closed shop contract, by picketing the retail food

5. 2 CCH Lab Cas 125 (Cal 1939). In the absence of the connection of a product and the limiting of picketing thereto, secondary picketing is illegal. *Sontag Chain Stores v. Connolly*, 1 CCH Lab Cas 589 (Super Ct Los Angeles, 1938). See *supra*, this section.

6. 195 So 791 (La 1940).

7. 276 NY 281, 11 NE(2d) 910, 116 ALR 477 (1938).

8. See, for a discussion of the meaning, if any, of "unity of interest," *supra*, this section, and *infra*, section 445.

9. 20 NE(2d) (Ind 1939).

stores where the company's milk was sold. The language employed by the court indicated approval of the union's contention that it had a right to engage in such picketing, but an injunction was issued in restraint thereof because (1) the picketing was accompanied by false bannerings; (2) no other dairy products company in the community was unionized;¹⁰ (3) "milk and dairy products are necessary to the public health, and public policy will not permit picketing for the purpose of coercing or inducing the community to refrain from using milk."

A recent New Jersey case, *Newark Ladder Co. v. Furniture Workers Union*,¹¹ cited the *Goldfinger* case with approval, and held that striking employees of the manufacturing department of a business could picket the sales department of the business conducted at some distance from the manufacturing department. The presence of the element of common ownership of the manufacturing and sales departments, however, militates against citation of the case as one supporting even a qualified approval of secondary picketing.¹² Separate corporations were involved, but the court pierced the corporate veil and found that the owners of the different corporations were the same.

The Restatement of Torts subscribes to the legality of secondary picketing,¹³ but with two qualifications. In the first place, the picketing must be directed solely against the

10. "The appellants rely upon the *Goldfinger* case as supporting their positions, but concede that it is to be distinguished from the case at bar for the reason that in that case the plant whose products were picketed was the only one in New York producing non-union goods, whereas in the case at bar there is no plant producing union goods."

11. 125 NJ Eq 99, 4 A(2d) 49 (1939).

12. See also *Ritholz v. Andert* 303 Ill App 61, 24 NE(2d) 573 (1939), where picketing of retail stores owned by a proprietor who likewise owned a factory from which the

picketing employees had been locked out was permitted, in spite of the proprietor's illusory sale of the factory to an employee, in an attempt to separate the ownership of the two enterprises.

13. Rest., Torts (1939), secs. 799-801. No distinction is made between picketing the retailer and picketing the consumer ("If, for example, A is the manufacturer of the X brand soap, employees may, under the rule stated in this section, induce wholesalers, retailers and housewives not to purchase that soap." Section 799b.)

product of the person involved in the primary dispute, and not also against the third person generally.¹⁴ In the second place, the third party must be permitted without molestation to dispose of his stock on hand, which he had prior to the time he was notified of the primary labor dispute.¹⁵ As illustrated in the Restatement, this second qualification is as follows: "A's employees go out on strike for a proper object. B, a retailer, sells products manufactured by A. The employees request B to cease buying A's product. B agrees and does in fact cease but continues to sell the products in his stock on hand. The employees seek to induce him by picketing his store to refrain also from selling

14. "In all these cases, however, the scope of the request must be limited to A and his products. If the request is so confined, A is not entitled to complain, since his loss of sales is due only to the fair persuasion of the prospective purchasers. B, the retailer, is also not entitled to complain, since the action is not directed at him and his loss of sales, if any, is due only to the diminution in the prestige of the goods which he buys and markets, a diminution which A's employees are privileged to cause. If, however, the third persons are requested not to buy other goods from B because he sells A's soap, the rule stated in this Section is inapplicable. . . .; for then B is being induced not to buy from A and his inducement is not by fair persuasion but by economic pressure. If he continues to market A's soap, he is threatened not merely with loss of sales of that soap but with loss of sales of other products having no relation to A." Rest. Torts (1939), section 799(b).

A difference in reasoning needs to be noted. The Restatement recognizes the legality not only of secondary picketing, but of secondary boycotting as well (Restatement, Torts (1939), Sections 798-801). To

be legal, both forms of pressure must be directed to the product manufactured by the allegedly unfair employer or otherwise connected with him (Restatement, Torts (1939), Section 799). The Restatement it is clear, does not distinguish between secondary picketing and secondary boycotting by limiting only the former to activity directed against the product and not generally against the person selling or using the product. Yet this is precisely what the New York Court of Appeals has done in the Goldfinger case (supra), and what the Louisiana court has done in the Johnson case (supra). Suppose the union engaged in a general boycott, unconnected with picketing, wherein they threatened to boycott B, unless he refrained from selling A's product, and suppose the union limited its boycott to B's sale of the product, and not to B generally.* Under the Restatement, this would be legal. Under the New York and Louisiana cases, however, the answer is not so clear, because the legality of the secondary action is placed partly upon the ground that picketing is involved, and not other forms of boycotting.

15. Rest., Torts (1939), section 801, illustration 2.

this stock. The [permissive] rule stated in this section does not apply."¹⁶

Section 124. Excessive Picketing—In General.

Excessiveness is everywhere held to affect the legality of otherwise lawful picketing. Picketing accompanied by violence,¹⁷ obstruction of the premises picketed (as in mass picketing)¹⁸ or false, insulting or misleading banners,¹⁹ is accordingly held to be illegal everywhere. In *Wallace v. International Ass'n of Mechanics*²⁰ the court tabulated as illegal the following types of conduct: "We disapprove of taking the license numbers of automobiles belonging to customers of plaintiffs, as it may reasonably be interpreted by such customers as an implied threat to do them injury and thereby interfere with the right of the plaintiffs to transact business. Following the employers home by patrol car must be avoided. Crowds of union men or sympathizers should not be permitted to loiter in front of business places as such may intimidate customers. . . . There must be no interference with employers who wish to work nor with the public desiring to transact business with the plaintiffs. The non-union man has the right to go through a picket line without being subjected to intimidation or violence. The right of free ingress to, and egress from the plaintiff's business establishments must be maintained inviolate."

16. Rest, Torts (1939), section 801, illustration 2.

17. *Levy & Devaney, Inc. v Int'l Pocketbook Workers Union*, 114 Conn 319, 158 A 793 (1931); *Liasse v. Local Union*, 2 Cal(2d) 312, 41 P(2d) 314 (1935).

18. *Beaton v. Tarrant*, 102 Ill App 1214 (1902); *Eastwood-Nealley Corporation v Int'l Ass'n*, 124 NJ Eq 274, 1 A(2d) 474 (1939); *Remington Rand, Inc. v. Crofoot*, 279 NY 635, 19 NE(2d) 37 (1938); *Gertz v. Randau*, 102 Misc 766, 295 NYS 871 (1937); *Jefferson & Indiana Coal Co. v. Marks*, 287 Pa 171, 134 A 430 (1926).

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19. *Godin v. Niebuhr*, 236 Mass 350, 128 NE 406 (1920); *Martineau v. Foley*, 231 Mass 220, 120 NE 445, 1 ALR 1145 (1918); *Olympia Operating Co. v. Costello*, 278 Mass 175, 179 NE 804 (1932); *Beck v. Ry. Teamsters Union*, 118 Mich 406, 77 NW 12, 42 LRA 407, 74 Am St Rep 421 (1898); *J. H. & S. Theatres, Inc. v. Fay*, 260 NY 315, 183 NE 600 (1932); *Nann v. Raimist*, 255 NY 307, 174 NE 690, 73 ALR 669 (1931); *Wilner v. Bless*, 243 NY 544, 154 NE 398 (1926); *Piccadilly Laundry Service, Inc. v. Broader*, 252 NY 539, 170 NE 125 (1929).

20. 63 P(2d) 1090 (Oregon, 1936).

Gegas v. Greek Restaurant Workers Club²¹ is an interesting case in point. There the court, while stating its approval of peaceful picketing held the particular picketing carried on unlawful, partly because it was silent and hence intimidating. In **Greenfield v. Central Labor Council**,²² picketing was enjoined because carried on in "loud tones" which the court defined as being any tone louder than the conversational, while in **Levy & Devaney, Inc. v. International Pocketbook Workers Union**²³ pickets were totally enjoined from picketing partly because they gave "threatening looks" and thereby must be presumed to have intimidated the non-coöperating employees involved in the controversy.

Cases involving excessive picketing rarely present instances of single excesses. The picture is rather one of a general plan of lawlessness, each case presenting a plan or course of conduct peculiar to itself. The factual situation in **Busch Jewelry Co. v. United Retail Employees' Union**²⁴ is a typical instance of a lawless pattern. The facts there disclosed, as described by the court, were as follows: "From noon of May 17, 1938 until May 26th pickets in crowds blocked the walks in front of the companies' stores and prevented prospective customers from entering, not only by crowding the entrances but often by threats and physical violence. Employees who remained at work were intimidated by threats of personal violence and coercion. The pickets in crowds used loud, violent and obscene language, and made false and fraudulent statements to induce injury to and destruction of the companies' property. By violence, force, threats and obscene and abusive language they prevented customers from paying bills which they owed the companies. Not content with picketing the companies' places of business, they threatened in a violent manner to picket the homes of employees and customers, and thereafter did picket the homes of certain employees and customers. They yelled and shouted and conducted snake

^{21.} 99 NJ Eq 770, 134 A 309 (1926).

^{22.} 104 Or 236, 192 P 783, 207 P 168 (1922).

^{23.} 114 Conn 319, 158 A 793 (1931).

^{24.} 281 NY 150, 22 NE(2d) 320 (1939).

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dances in front of the companies' stores, and by their conduct collected large crowds. They called the companies' employees 'dirty scabs, and rats,' and stated to them, 'You will get yours for continuing to work.' An employee was told that he had better come out on strike, that the union 'will get you.' A lady customer on leaving a store was told that if she didn't take the merchandise back into the store they would 'get' her. A lady employee as she was entering a store was abused and threatened, and a striker put his arms around her in an effort to keep her from entering the store. The strikers shouted that the companies gave 'phoney' receipts and that their jewelry was second hand. Prescriptions for glasses, left by customers, were withdrawn from the store files."

Section 125. Excessive Picketing—Regulation of Number of Pickets and the Manner of Picketing.

American picketing law prior to the year 1921 involved mainly the problem of determining simply whether picketing was or was not legal per se. In that year the United States Supreme Court issued its decision in *American Steel Foundries v. Tri-City Central Trades Council*.³⁵ While the court in that case used the word "sinister" in connection with the practice of picketing and, indeed, said that "the name 'picket' indicated a militant purpose inconsistent with peaceful persuasion" the decision permitted the employment of a single "missionary" in front of each large entrance of the plant involved in the dispute. The distinction which the court drew between a "picket" and a "missionary" is one not easily understood but it is quite probable that the court had in mind the functions of a picket (1) to ascertain the identity of non-cooperating workingmen, and (2) to persuade without intimidating or coercing. In any event the court made much of the "flexible remedial power of a court of equity" which must be exercised to regulate the practice of picketing or the employment of missionaries in connection with labor disputes. "Each case."

³⁵ 257 US 184, 42 S Ct 72, 55 L Ed 189, 27 ALR 360 (1921).

said the court, "must turn on its own circumstances. It is a case for the flexible remedial power of a court of equity which may try one mode of restraint, and if it fails or proves to be too drastic, may change it. We think that the strikers and their sympathizers engaged in the economic struggle should be limited to one representative for each point of ingress and egress in the plant or place of business and that all others be enjoined from congregating or loitering at the plant or in the neighboring street by which access is had to the plant, that such representatives should have the right of observation, communication and persuasion but with special admonition that their communication, arguments and appeals shall not be abusive, libelous or threatening, and that they shall not approach individuals together but singly, and shall not in their single efforts at communication or persuasion obstruct an unwilling listener by importunate following or dogging his steps. This is not laid down as a rigid rule, but only as one which should apply to this case under the circumstances disclosed by the evidence and which may be varied in other cases. It becomes a question for the judgment of the Chancellor who has heard the witnesses, familiarized himself with the locus in quo and observed the tendencies to disturbance and conflict. The purpose should be to prevent the inevitable intimidation of the presence of groups of pickets, but to allow missionaries."

The practice since the decision in the American Steel Foundries case²⁶ has been to recognize the legality of picketing if peacefully employed by a reasonable number of pickets acting in a reasonable manner under the circumstances.²⁷ The authorities have been lacking in uniformity

26. 257 U.S. 184, 42 S. Ct. 72, 55 L. Ed. 180, 27 ALR 360 (1921).

27. "Since the Tri-City case, it is almost universal practice carefully to limit the number of pickets. The device of requiring the persons stationed to be registered and to wear distinguishing bands or numbers is now being frequently re-

sorted to, and the distance which the 'representatives' must constantly keep between each other is sometimes prescribed in the injunction. One court has even placed a limitation upon hours when the workers may maintain the patrol." Hellerstein, *Picketing Legislation and the Courts* (1932), 10 NCL Rev 158, 183

as to the permissible number of pickets and the manner of picketing. It has been held that a list containing the names of the pickets employed in connection with the controversy must be delivered to the United States Marshal "accompanied by a rough plat or plats showing the designation and location of each picket post."²⁹ It has also been held that pickets must be citizens of the United States, able to speak the English language.³⁰

Most of the cases are concerned with the number of pickets which may be employed at one time. In many cases, the number of pickets have been limited to two,³¹ while in others no more than three³² or four³³ pickets have been allowed. In still others, reflecting the distinction which the court drew between "pickets" and "missionaries", a single picket only has been allowed.³⁴ In one case, the court refused to limit the number of pickets, where they were employed for "persuasion only."³⁴

See also Landis, *Cases on Labor Law* (1934), p. 218n

29. *Clarkson Coal Company v. United Mine Workers of America* (DCD Ohio 1927)

30. *Clarkson Coal Company v. United Mine Workers of America* (DCD Ohio 1927)

31. *United Chain Theatres v. Philadelphia M.P.M.O.U.* 50 F(2d) 189 (DC FD Pa 1931); *Simpson v. Int'l Jewelry W. U.* (NJ Ch 1939), A. L. Reed Co. v. Whiteman, 238 NY 545, 144 NE 885 (1923); *Bloomfield Co. v. Joint Board*, 12 Law & Labor 90 (Comm Pl Ohio 1930).

32. *Great Northern Rwy. Co. v. Brosseau*, 286 F 414 (DCD N Dak 1923); *Clarkson Coal Co. v. United Mine Workers of America* (DCD Ohio 1927).

33. *Snead & Co. v. Int'l Molders' Union*, 103 NJ Eq 332, 143 A 331 (1928). ("But said pickets shall keep separate by at least a block from each other. . . ."); *La France Electrical Construction and Supply* 346

Co. v. International Brotherhood of Electrical Workers, 108 Ohio St 61, 140 NE 899 (1923). In New York, four pickets are permitted in connection with city controversies, unless the police, in the exercise of apparently absolute discretion, determine that only two shall be allowed. See *supra*, section 41.

34. *Stearns & Co. v. United Mine Workers of America* (Wayne Co Cir Ct, 9/20/30); *Greenfield v. Central Labor Council*, 104 Or 236, 192 P 763 (1926); 104 Or 259, 207 P 168 (1922).

34. *Great Northern Ry. Co. v. Local Great Falls Lodge*, 283 F 557 (DCD Mont, 1922). In *Forstmann & Huffman Co. v. United Front Committee*, 99 NJ Eq 230, 123 A 202 (1926) the court, while stating that it would "hear counsel as to the form of the order", stated that the injunction order would "include an injunction to prevent picketing by groups sufficiently large in numbers to accomplish the illegal purposes" of intimidation or undue annoyance. [1 Teller]

The presence of four men patrolling the sidewalk in front of a theatre together with sympathizers in an automobile parked at the curb, it has been said,³⁵ cannot but constitute a kind of implied threat or intimidation as to such of the public as are susceptible to that sort of influence.

In *Goldfield Consol. Mines Co. v. Goldfield Miners' Union*,³⁶ the court had before it a case of mass picketing, and thus characterized its necessary implications and consequences: "It is idle to talk of 30 to 75 pickets, and at times more than 100, gathering twice a day at the crossing for friendly solicitation. Such bands of men were never sent by the union to confer with the Mine Operators' Association. The picketing, designed by the instructions, was designed and intended to inspire fear and apprehension among the employees."

The Minnesota State Labor Relations Act regulates the manner of picketing whether carried on in connection with, or in the absence of, a strike. By Section 11(d) of the Act, it is declared an unfair labor practice "For any person to picket or cause to be picketed a place of employment of which place said person is not an employee while a strike is in progress affecting said place of employment, unless the majority of persons engaged in picketing said place of employment at said times are employees of said place of employment." A majority of pickets must be employees, nothing in the statute, however, requiring a majority of the employer's employees to be engaged in the strike as a condition to the legality of the picketing. Section 11(e) of the Act provides that it shall be an unfair labor practice "For more than one person to picket or cause to be picketed a single entrance to any place of employment where no strike is in progress at the time." The implication of the two subdivisions of Section 11 of the Act appears to be that,

³⁵. *United Chain Theatres v. Philadelphia M.P.M.O.U.* 50 F(2d) 180 (DC ED Pa 1931).

³⁶. 159 F 500 (CCA Nev 1908) c/f *Rest., Torts* (1939) sec. 779(8), where two of the functions of pick-

eting are mentioned to be (1) that of combating rumors that the strike has failed and (2) that of bolstering the morale of those engaged in the controversy.

while a single picket only may patrol the premises of an establishment picketed in the absence of a strike, an indefinite number of pickets may be employed in connection with premises picketed in furtherance of a strike.

Section 126. Excessive Picketing—Instances of Bannering, False and True.

In four main classes and numerous other types of cases courts have been confronted with the problem as to whether bannering by peaceful pickets may be enjoined as false, or whether it must be allowed as true. The first class of cases involves the use of the word "strikebreaker" in connection with employees who remain on the job in disregard of a strike order. The courts generally hold such bannering enjoinable as false. Thus in *People on complaint of Siegel v. Kaye*,³⁷ where the complainant was bannered as a strikebreaker, the pickets were held guilty of disorderly conduct for so doing, because it appeared that the complainant had been employed for nine years by the employer against whom the union had struck, and that she had refused to join in the strike. The theory upon which such bannering is held to be false is that a strikebreaker is one who takes the place of a striker, and not one who remains on the job in disregard of a strike order. Thus in *State v. Zanker*,³⁸ where a picket was held guilty of disorderly conduct partly because he engaged in false bannering, the court said: "Norma Christensen was not a strikebreaker. She had not taken the place of a striker."

In the second class of cases, the truth of the use of the word "strike" is questioned. It is everywhere held that it is unlawful to banner an establishment as one engaged in a strike, where no strike in fact exists.³⁹ What is in dispute,

37. 165 Misc 663, 1 NYS 2d 354 (1937).

38. 179 Minn 355, 229 NW 311 (1930).

39. 214-220 Market Street Corp. v. Delicatessen Local, 118 Nf Eq 448, 179 A 699 (1935); *Wilner v. Bless*, 243 NY 544, 154 NE 598 (1926).

Esco Operating Corp. v. Kaplan, 144 Misc 646 258 NYS 303 (1932). See *United States Gypsum Co. v. Heslop*, 39 F(2d) 228 (DC ND Iowa 1930); *Phillip Henric Co. v. Alexander*, 198 Ill App 568 (1918); *Harvey v. Chapman*, 226 Mass 191, 115 NE 304, LRA 1017E, 389 (1917).

however, is the answer to the question whether a strike may be said to exist in the given case. The question is usually raised in connection with a situation where only one or merely some of many employees have responded to the strike call, or where the employer hires others to take the places of the strikers and the business continues or is resumed. In *People v. Tepel*,⁴⁰ pickets were held not guilty of misrepresentation in announcing to the public the existence of a strike, where only one employee quit work in response to a general strike call. In *Taukin v. Hotel & Restaurant Workers Union*,⁴¹ it appeared that the plaintiff employer, against whom a strike had been called by his C. I. O. union employees, thereafter entered into a contract with an A. F. L. union, who supplied the employer with workmen pursuant thereto, to take the place of the striking C. I. O. employees. The employer thereupon sought to enjoin the picketing upon the ground, among others, that the bannering of the plaintiff's place of business as one on strike was false. The court, however, took an opposite view, saying that "those employees who do not return to work are still entitled to the classification of striking employees."

The third class of cases involves use of the word "unfair" in connection with the given controversy. In some of the cases wherein use of the term "unfair" is enjoined, the injunction is predicated upon the theory that such term contains an ingredient of intimidation which, if applied to one who is not the party involved in the dispute but who is connected therewith as a third party because he is a vendee or a vendor of the party involved in the dispute, constitutes an illegal secondary boycott.⁴² In other cases, however, such bannering is held unlawful simply because it is held to be untrue as applied to the particular situation. Thus in

40. 3 NYS(2d) 779 (NY City Magistrates Court 1939) *c/f* *Edelman v. Retail Grocery Clerks Union*, 119 Misc 618, 198 NYS 17 (1922).

41. 30 Pa D & C 537 (1939).

42. See *infra*, section 152, for a discussion of the relationship between intimidation and use of the word "unfair."

Traub Amusement Co. v. Macker,⁴³ bannering of the employer as "unfair" was held improper in the absence of evidence of unfair dealings or discrimination in connection with union employees. So also in Driggs Dairy Farms v. Milk Drivers Union,⁴⁴ where the employer was bannered among other things, as "unfair to organized labor", the court held such bannering improper where it appeared that the union sought unsuccessfully to bring about a strike, and, upon failure of the strike, commenced to picket.

Similarly in Hotel v. Miller⁴⁵ the court enjoined bannering of the employer as "unfair" where he was not, according to the evidence, unfair. In that case it appeared that the employer permitted the picketing labor union to solicit his employees to become members of the union at a time when only one of the employer's twenty-five employees belonged to the union. Soon thereafter the employees spoke of forming a union of their own to which the employer agreed. The evidence was conflicting in connection with the union's claim that the employer opposed the union movement in spite of his permission to the union to attempt to organize the employees. The court said, in this respect, "We think the weight of the evidence is that he left to the employees what action should be taken after having stated what he deemed to be the advantages and disadvantages of joining the union—perhaps emphasizing the disadvantages." A company union was formed, and the employer entered into a contract with it. Prior to execution of the contract the single employee who belonged to the outside union was discharged. It was after execution of the contract with the company union that picketing was commenced. From these facts the court concluded that "Here the employer was not 'unfair to organized labor.' He had the right to be let alone. He was entitled to the law's protection from a third party's interference." ⁴⁶

43. 127 Misc 335, 213 NYS 397 (1938).
(1925).

44. 49 Ohio App 303, 197 NF 250
(1935).

45. 272 Ky 471, 114 SW(2d) 501

(1938).
46. See also Bull v. International
Alliance, 119 Kan 713, 241 P 459
(1925); Schuberg v. Local Interna-
tional Alliance, 37 BC 284, 3 DLR 166

So also in *Pando v. Bartenders' International Alliance*,⁴⁷ the picketing union was prohibited from using the term "unfair" in connection with the particular controversy there involved. It appeared that the plaintiff had entered into a closed shop contract with the C. I. O., which represented all of the plaintiff's employees. Thereupon the A. F. L. commenced to picket. The picketing itself was likewise held illegal, but the court took occasion to note that the term "unfair" was a falsehood as applied to the particular controversy. "To broadcast before the unionized population of Uniontown and vicinity the statement on the placard that the plaintiff is unfair to organized labor under these circumstances", said the court, "is equivalent to the General Assembly of the Presbyterian Church publicly declaring that the Roman Catholic Church is unfair to organized religion. Both are broadly recognized members, with different views, of a universal church, based upon the language of its Founder. For either to picket the other and seek to gain advantage by means of a statement that the other is unfair to such organized institutions is clearly a false statement amounting to fraudulent misrepresentation."⁴⁸

By far the preponderance of judicial decisions, however, supports the rule that labor unions have the right to banner an employer as unfair in connection with a labor controversy.⁴⁹ The present trend of decisions reaches this con-

(1926), aff'd 38 BC 130, 2 DLR 20, 47 Can Cr Cas 213 (1927).

47. 2 CCH Lab Cas 359 (Penna 1940).

48. Accord: *Brickley Dairy Co. v. United Dairy Workers* (Circuit Ct Wayne Co 1940). See also *Consolidated Terminal Co. v. Drivers Local Union*. — F Supp — (DCD Col 1940).

49. *Senn v. Tile Layers Protective Union*, 301 US 468, 57 S Ct 857, 81 L Ed 1229 (1937); *Cinderella Theatre Co. v. Sign Writers' Local Union*, 6 F Supp 164 (DC ED Mich SD 1934); *Denver Local Union v. Perry Truck Lines, Inc.* — Colo —, 101 P

(2d) 436 (1940); *Schuster v. Int'l Ass'n*, 293 Ill App 177, 12 NE(2d) 50 (1938); *Phillip Henric Co. v. Alexander*, 198 Ill App 568 (1916); *Vonderschmitt v. McGuire*, 100 Ind App 632, 195 NE 585 (1935); *Dehan v. Hotel Employees*, 159 S 637 (La App 1935); *Iverson v. Dulno*, 44 Mont 570, 119 P 219 (1911); *Steffes v. M.P.M.O.U.*, 136 Minn 200, 161 NW 524 (1917); *Thompson v. Deheatesen Workers Union*, 8 A(2d) 133 (NJ Eq. 1939); *Manker v. Bakers' Union*, 129 Misc 516, 221 NYS 106 (1927); *S. A. Clark Lunch Co. v. Cleveland Waiters Local*, 22 Ohio

clusion upon the broad ground that use of the word "unfair" in connection with labor controversies is simply a means of apprising the public of the picketing union's quarrel with the employer's labor policy. As stated in *Steffes v. Motion Picture Machine Operators Union*,⁵⁰ "The term 'unfair' as used by organized labor has come to have a meaning well understood. It means that the person so designated is unfriendly to organized labor or that he refuses to recognize its rules and regulations. It charges no moral shortcomings and no want of business capacity or integrity."⁵¹ It has been held lawful to banner an owner of a business as "unfair" where he refuses to employ union men in substitution for himself in connection with work necessary to be done in the business.⁵²

The fourth class of cases involves use of the word "scab." In *Nann v. Raimist*,⁵³ which involved a dispute between competing labor unions, the court, per Cardozo, C. J., admitted that the term "scab" was "closer to the border line" between mere advertising technique on the one side, and libel and intimidation upon the other. "Even these statements", continued the court, "are in essence expressions of opinion, dependent in the main upon an appraisal of methods and motives, and gaining much of their significance from context and occasion." The court refused to enjoin use of the term, saying "there is a near approach to the ludicrous when a member of one union debating an indus-

App 265, 154 NE 362 (1926), *Kimbel v. Lumber Union* 189 Wash 416, 65 P(2d) 1066 (1937), *Zant v. Building Trades Council*, 172 Wash 445, 20 P(2d) 589 (1933). But the bannerings of an employer as "unfair" is unlawful, where the main purpose of the picketing is to effect a settlement in connection with a claim for damages by the union against the employer, *Jensen v. St. Paul M.P.M.U.* 194 Minn 59, 259 NW 811 (1935).

50. 136 Minn 200, 161 NW 524 (1927).

51. See, for similar expressions, *Cinderella Theatre Co. Inc. v. Sign* 392

Writers Local U. 6 F Supp 164 (DC ED Mich SD 1934), *Thompson v. Delicatessen Workers Union*, 8 A(2d) 133 (N1 Eq 1938). In *Dick v. Stephenson*, 3 West Week Rep 761 (Alberta, 1923) the union was permitted to publicize "fair" restaurants without mentioning those "unfair."

52. *Senn v. Tile Layers Protective Union*, 301 US 464, 57 S Ct 857, 81 L Ed 1220 (1937), *Zant v. Building Trades Council*, 172 Wash. 445, 20 P(2d) 589 (1933).

53. 255 NY 307, 174 NE 690, 73 ALR 669 (1931).

trial dispute with a member of another is restrained by the solemn mandate of an injunction from stating his belief that the rival union is a 'scab.' Here too, as in cases involving use of the word "unfair" the question is raised as to whether use of the term "scab" involves an ingredient of intimidation of non-cooperating employees so as to constitute its use the equivalent of a secondary boycott.⁵⁴ It has been held that a union may be held liable in damages for libel, for falsely stating that the employer employed inferior scab labor.⁵⁵ It has also been held libellous per se to call a man a "scab."⁵⁶ In another case,⁵⁷ however, the court took a different view of the word, saying: "The word is coarse and offensive, to be sure, but it carries with it no import of infamy or crime." It has been held that the word "scab" cannot properly be applied to an establishment simply because it advertises in a newspaper involved in a controversy with the picketing union.⁵⁸ In numerous other cases, picketing has been held unlawful because of false bannerering. In *Mlle. Reif v. Randau*,⁵⁹ the plaintiff, proprietor of a beauty parlor, sought to enjoin the defendant union from picketing her establishment because she advertised through the medium of a newspaper engaged in a labor dispute. The picketing was enjoined mainly because it constituted illegal secondary picketing. It appeared also, however, and the court noted censuringly, that picketing was carried on in the following manner: "On at least one occasion, a so-called picket, masqueraded, the plaintiff saying as a gorilla, the defendant admits as a monkey, paraded in front of the plaintiff's establishment, and it is charged that this gorilla, going through the antics of his ancestors, carried a sign 'I was once a beautiful woman' while a fellow picket shouted 'Don't patronize Mlle. Reif. This is what happens if you patronize this place.'" In

54. See *infra*, section 153

55. *Parker v. Bricklayers Union*,
10 Ohio Dec Rep. 458 (1889).

56. *Prince v. Soc. Pub. Ass'n*, 31
Misc 234, 64 NYS 285 (1900)

57. *Wood Mowing & Reaping*

Mach. Co. v. Toohey, 114 Misc 185,
186 NYS 95 (1921)

58. *Mlle. Reif v. Randau*, 166 Misc
226, 1 NYS(2d) 515 (1937).

59. 166 Misc 247, 1 NYS(2d) 515

(1937).

Wiest v. Dirks,⁶⁰ picketing was held enjoined because misleading where the person picketed and bannered as follows: "Please buy union products only. This store sells milk produced in an unfair dairy. East End Dairy is unfair to organized labor" bought his milk from a non-union dairy, but none of the dairies in the vicinity were unionized. Said the court: "The natural conclusion to be drawn from the information upon the banners is that the appellee was selling non-union products by choice when he might obtain union products, and, since the other food stores were not picketed, it would be naturally concluded that the products sold in those other stores were union products and that they differed in this respect from those sold in the appellee's store. This, according to the evidence, is not true. All dairy products available in the community were produced in plants which employ both union and non union employees, or at least none was produced in shops employing union labor exclusively."

In several cases the courts have enjoined bannering or the making of statements in connection with labor controversies to the effect that the premises of the employer are dangerous for the public to enter. Thus in *J. H. & S. Theatres v. Fay*⁶¹ the court indicated the facts therein involved with the statement "The injunction should prohibit the defendant from circulating orally or in writing, by personal argument or by public meeting, any statement which falsely represents the attitude of the plaintiff towards union labor or that patrons of the plaintiff's theatres will be subjected to danger." Similarly in *Music Hall Theatre v. Moving Picture Machine Operators Local*,⁶² an injunction was ordered issued to the extent of restraining further unlawful acts, where it appeared that "the picketers accosted prospective patrons at the entrance and about the theatre, and, calling them aside, talked with them. Some of them were told that the building was a fire trap. . . . That the operators were not union men, and did not understand their

60. 20 NE(2d) 969 (Ind 1930)

62. 246 Ky 639, 61 SW(2d) 283

61. 260 NY 316, 183 NE 509 (1933).
(1932).

business; and that there would likely be a fire.”⁶³

In New York, where picketing by rival unions is permitted even though both of the unions are bona fide labor organizations, and in spite of the fact that the employer has theretofore entered into a collective bargaining agreement with one of the unions,⁶⁴ the courts have been confronted with the problem as to whether the picketing union is under an obligation to inform the public that the employer is under contract with a rival union. The courts have uniformly given a negative answer to the question. The picketing union may banner the employer as one who refuses to employ members of the picketing union, without adding upon the banner that members of another union are employed.⁶⁵

It is unlawful, when such are not the facts, for pickets to banner an employer with statements that the employer refuses to hire union labor,⁶⁶ or that he refuses to deal with the union collectively,⁶⁷ or that wages are low in a specific sum,⁶⁸ or that the employer has locked out his employees.⁶⁹ However, pickets may banner an employer as one who refuses to employ union labor where only some of the employees are on strike, the remaining employees having been discharged.⁷⁰ It is unlawful for a picketing union to state

63. See also *Esco Operating Corp. v. Kaplan*, 144 Misc 646, 258 NYS 303 (1932); *Allied Amusements v. Reaney*, 3 West Week Rep 129 (Manitoba 1936), *Kershaw Theatres v. Reaney*, 3 West Week Rep 138, 4 DLR 414 (Manitoba 1936).

64. *Stillwell Theatre v. Kaplan*, 259 NY 405, 182 NE 63, 84 ALR 6 (1932), rehearing denied 260 NY 563, 184 NE 83, 84 ALR 12 (1932), cert den, 288 US 608, 53 S (1 397, 77 L Ed 981 (1933).

65. *Edjomee Amusement Corporation v. Empire State M.P.O.U.*, 273 NY 647, 8 NE(2d) 329 (1937); *Buy Wise Markets v. Winokur*, 167 Misc 235, 2 NYS(2d) 854 (1938); *N. & R.*

Theatres v. Basson, 127 Misc 271, 215 NYS 157 (1926).

66. *Herrzog v. Cline*, 131 Misc 816, 227 NYS 462 (1927). See also *Paramount Enterprises v. Mitchell*, 104 Fla 407, 140 S 407 (1932), *Tree-Mark Shoe Co. v. Schwartz*, 139 Misc 136 248 NYS 56 (1931).

67. *Grandview Dairy v. O'Leary*, 158 Misc 791, 285 NYS 541 (1936).

68. *R. A. Freed & Co. v. Doe*, 154 Misc 644, 278 NYS 68 (1933), 283 NYS 186 (1935).

69. *Olympia Operating Co. v. Costello*, 278 Mass 125 179 NE 804 (1932); *Wilner v. Bless*, 243 NY 544, 154 NE 598 (1926).

70. *Kirmse v. Adler*, 311 Pa 78, 166 A 566 (1933).

on the banner employed in picketing that the union is affiliated with the American Federation of Labor, when such is not the fact.^{70a} In *Zweibon v. Goldberg*,⁷¹ the plaintiff, who conducted the business himself without the aid of any employees, was picketed with banners which read: "Please do not patronize this place, carpets and linoleum being done by non-union labor." The court held such bannering false, saying "The obvious purpose of the picketing in which defendants are engaged is to create in the minds of the public the false impression that plaintiff is employing non-union labor."

It has been held fraudulent for a labor union to represent that a given strike was the result of the employer's refusal to enter into a collective bargaining agreement with the striking union, where it appears that the union does not represent a majority of the employer's employees, and that the employer would consequently be guilty of an unfair labor practice under the National Labor Relations Act if it entered into an agreement such as the union proposed, which contained a closed shop provision.⁷²

Section 127. Remedies for Excessive Picketing—The Blanket Injunction.

It is the general rule that violent, intimidating or otherwise unlawful picketing may subject the pickets to a blanket injunction restraining those enjoined from picketing even in a peaceful manner.⁷³ Issuance of such a blanket injunction is justified upon two separate grounds. The first ground advanced is that unions which engage in excessive-ness in connection with labor disputes thereby forfeit the

70a. *Jordan's Wearing Apparel v. Retail Sales Clerks Union*, 193 A 806 (NJ Eq 1937).

71. — *Misc.* —, 20 NYS(2d) 272 (1946).

72. *Pauly Jail Building Company v. International Association*, 29 F Supp 15 (DC ED Mo 1939).

73. See *Vaughan v. Kansas City M.P.O.U.*, 36 F(2d) 78 (DC WD Mo. 1929); *Riggs v. Tucker*, 196 Ark 571, 396

119 SW(2d) 507 (1939); *Levy & Devaney, Inc. v. International Pictograph Workers Union*, 114 Conn 319, 158 A 795 (1932); *Joe Dan Market v. Wintz*, 223 Mo App 772, 20 SW(2d) 567 (1929); *Forstman & Hoffman Company v. United Front Committee*, 99 NJ Eq 230, 133 A 202 (1928); *Bones v. Providence Local*, 51 RI 500, 155 A 581 (1931). See also *Rest., Torts* (1939) sec 616.

rights or privileges accorded to labor to engage in labor activity. As stated in *Busch Jewelry Company v. United Retail Employees Union*,⁷⁴ "Unions which authorize a strike and picketing are under a legal responsibility to the public not only to avail themselves of their lawful rights in a legal way, but also to endeavor to uphold all laws and to avoid the destruction of property, disorderly conduct, personal assaults, breach of the peace, violence and fraud. When unions not only fail to live up to that responsibility but deliberately, wilfully and with full knowledge that their acts are illegal, advise and encourage the commission of acts which are in violation of law and result in disorderly conduct and breach of the peace, they are no longer entitled to the benefits of special statutes enacted to protect them in the enjoyment of their conceded right of peaceful picketing." The second ground, which is one more usually advanced, is that unions which engage in violent, intimidating or otherwise unlawful picketing cannot be expected in the future to modify their practices and hence a blanket injunction is necessary to insure against future excesses.⁷⁵

Labor has been insisting that the blanket injunction in labor cases is a breach with the generally understood function of the equity injunction, for only a qualified decree directed against the excessiveness is said to be justifiable if protection and not punishment is the end to be sought. Indeed, it is quite well settled that the injunctive power of a court of equity is designed to protect the person aggrieved

⁷⁴ 281 NY 150, 22 NE(2d) 320 (1939).

⁷⁵ See *Riggs v. Tucker*, 196 Ark 571, 119 SW(2d) 507 (1938); *Fuchs Candy Co. v. Int'l Longshoremen*, 2 CCH Lab Cas 837 (Cal Sup Ct San Francisco Co 1940); *Levy & Devaney, Inc. v. International Pocketbook Workers Union*, 114 Conn 319, 158 A 795 (1932); *International Pocketbook W. U. v. Orlove*, 158 Md 496, 148 A 826 (1930); *Forstman & Hoffman Company v. United Front Committee*, 99 NJ Eq 230, 133 A 202 (1926); *Bomes v. Providence Local*, 51 RI 500, 155 A 581 (1931). It is to be noted however, that where the alleged violence or intimidation takes place at a distance from the picket line, courts are less disposed to issue blanket injunctions. See *Vulcan Detinning Co. v. St. Clair*, 315 Ill 40 145 NE 657 (1924). See also *Fenske Bros. v. Upholsterers Int'l Union*, 358 Ill 239, 193 NE 112, 97 ALR 1318 (1934), cert den 295 US 734, 55 S Ct 645, 79 L Ed 1682 (1935).

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and not to punish the wrongdoer." Nevertheless, argues labor, courts have been oblivious in labor cases to the distinction otherwise carefully adhered to. The judiciary is said to proceed upon the tacit assumption that the right to picket is a privilege conditioned upon good behavior.

Recognition of the function of equity as a protector of property rather than as a penal institution appears, however, in a different class of cases, i. e., where after application made by an employer for equitable relief to restrain unlawful labor conduct, the given labor activity is abandoned. In such cases, further equitable relief is denied. Thus in *General Leather Products Company v. Luggage Union*,⁷⁷ an employer filed a bill against a labor union for an injunction against picketing and other allegedly unlawful features of a strike. Thereafter the strike was abandoned, the pickets were withdrawn, and the strikers either returned to work or obtained employment elsewhere. The defendant union moved to interpose a supplemental answer setting up such facts. The motion was granted, the court saying "an injunction is no longer necessary; whether it was once needed is a moot question which the court will not

76. *Iron Molders' Union v. Allis-Chalmers Co.* 166 F. 45, 20 LRA(NS) 315, 91 CCA 631 (CA 7, 1908); *Frankfurter and Greene, The Labor Injunction* (1929) p. 16. Nor is equity the proper forum for the enforcement of the criminal law. *GRI Engraving Co. v. Doerr*, 214 F. 111 (DC SD NY, 1914); *Seegenfeld v. Friedman*, 117 Misc. 737, 193 NYS 128 (1922); *Commonwealth v. Smith*, 266 Pa. 511, 169 A 746 (1920).

*For surely men are not to be denied the right to pursue a legitimate end in a legitimate way simply because they may have overstepped the mark and trespassed upon the rights of their adversary. A barrier at the line, with punishment and damages for having crossed, is all that the adversary is entitled to ask. . . . Under the name of

persuasion, duress may be used but it is duress, not persuasion that should be restrained and punished. In the guise of picketing strikers may obstruct and annoy the new men, and by insult and menacing attitude intimidate them as effectually as by physical assault. But from the evidence it can always be determined whether the efforts of the pickets are limited to getting into communication with the new men for the purpose of presenting arguments and appeals to their free judgments. Prohibition of persuasion and picketing, as such, should not be included in the decree." *Iron Molders' Union v. Allis-Chalmers Co.* supra

77. 119 NJ Eq 432, 183 A 165 (1936).

try."⁷⁸ Similarly in *Reynolds v. Everett*,⁷⁹ a final injunction against striking employees was held to have been properly refused where, before trial, the strike had ceased. It has been held, however, that where a plaintiff rightfully invokes the jurisdiction of an equity court to restrain a strike and picketing in connection therewith, and to recover consequential damages, the complaint may not be dismissed where the strike is thereafter terminated and the picketing ceases. In this case the defendant contended that the plaintiff should be relegated to an action at law to recover any damages suffered by reason of the conduct complained of, in view of the cessation of the activities by virtue of which the jurisdiction of equity was originally invoked, but the court held that equity, having once assumed jurisdiction, could retain it for the purpose of granting incidental relief by way of damages.⁸⁰

In New York, on the other hand, the courts have drawn a distinction between violent picketing or picketing practiced in disregard of a negative direction by the court, and picketing which is merely noisy. While the former activity is still subject to the blanket ban,⁸¹ the latter is held to justify only

⁷⁸ Costs: "If complainant had a good cause of action when it filed the bill, it is not deprived of costs by a cessation of defendant's wrongful conduct." *General Leather Products Co. v. Luggage Union*, 119 NJ Eq 432, 183 A 165 (1936).

⁷⁹ 144 NY 189, 30 NE 72 (1891).

⁸⁰ *The Nevins v. Kasmach* 279 NY 323, 18 NE(2d) 294 (1938). *Accord: Hubrite Informal Frocks v. Kramer*, 9 NE(2d) 570 (Mass 1937); *Simon v. Schwachman*, 18 NE(2d) 1 (Mass 1939); *McGinn v. Metropolitan Electric Ry. Co.* 133 NY 9, 30 NE 647 (1892); *Sadlier v. City of New York*, 185 NY 408, 78 NE 272 (1906). *c/f United States v. Anchor Coal Co.* 279 US 812, 49 S Ct 262, 73 L Ed 971 (1928); *Brownlow v. Schwartz*, 261 US 216, 43 S Ct 263, 67 L Ed 620 (1923); *Alejandro v.*

Quezon, 271 US 528, 46 S Ct 600, 70 L Ed 1071 (1926); *Bracken v. Securities Exchange Comm* 299 US 504, 57 S Ct 18, 81 L Ed 374 (1936).

The practice of the appellate federal courts is to remand the cause to the lower court with directions to vacate the decree and to dismiss the complaint upon the ground that the cause is moot. See *Leader v. Apex Hosiery Co.* 302 US 656, 58 S Ct 362, 82 L Ed 508 (1937).

⁸¹ *Nann v. Raumist*, 255 NY 307, 174 NE 690, 73 ALR 669 (1931). See also, for a case holding that a blanket injunction may be issued where picketing is carried on in violation of an express direction of the court, *Shapiro v. Amalgamated Watchmakers Union*, 2 CCH Lab Cas 222 (California, 1939). *c/f Long Is.*

a qualified mandate enjoining the excessiveness.⁸² The state anti-injunction Act⁸³ was at first held in *Busch Jewelry Co. v. United Retail Employees Union*⁸⁴ to leave the rule in this respect unchanged, but in a later Court of Appeals decision, *May's Furs, Inc. v. Bauer*,⁸⁵ it was implied that the blanket injunction has been abrogated in New York, and that peaceful picketing may not be enjoined in spite of prior violent picketing. A closer examination of the decision in the *May's* case indicates, however, that the blanket injunction may yet under certain circumstances be invoked notwithstanding the anti-injunction act. In the *May's* case, the *Busch* decision was "distinguished" as follows: "In the *Busch* case, a majority of this court read the record as disclosing a situation completely permeated by violence and as affording no ray of hope that the defendant would engage in other than violent picketing. The rule of that case presents an exception which is verbal rather than real, for since defendant would have engaged only in violent picketing, the unqualified prohibition of picketing operated only in the one kind of picketing present in that situation, viz., violent picketing. In that case peaceful picketing was out of the question. In the case at bar there is no finding to that effect, and so far as the record bears upon this issue, it appears that defendant has reformed its conduct in

land Drug Co. v. Devery, 6 NYS(2d) 390 (1938)

82. *J. H. & S. Theatre v. Fay*, 260 NY 315, 183 NE 509 (1932); *Wise Shoe Co. v. Lowenthal*, 266 NY 264, 194 NE 749 (1935). "Here, however, the excess has been noise and shouting whereby customers were frightened and crowds collected. We have never gone so far as to hold that wherever acts or words went beyond peaceful picketing, all picketing was to be enjoined." That the New York courts have sometimes not been particularly careful in protecting labor's side of the distinction noted in the text is evidenced by cases where blanket injunctions with but slight

modifications were issued, even though the evidence in support of actual violence was of dubious preponderance. *Brooklyn United Theater v. International Alliance*, 257 NY 555, 178 NE 793 (1931), *Stemknitz Amusement Corporation v. Kaplan*, 257 NY 204, 178 NE 11 (1931). In both cases, Cardozo, C. J. and Lehman, J. dissented.

83. § 876-A New York Civil Practice Act.

84. 281 NY 150, 22 NE(2d) 320 (1939).

85. 282 NY 331, 26 NE(2d) 279 (1940), rehearing denied 282 NY 804, 27 NE(2d) 210 (1940).

a more peaceful direction since the institution of this suit." It is submitted that if the Busch case is still the law, then the blanket injunction has been relatively unaffected by the state anti-injunction act. The blanket injunction has been explained and justified precisely upon the ground that prior unlawfulness leads to the conclusion that future peaceful activities are out of the question, or, as stated in the Busch case (and which is the same thing) that the facts may be read "as disclosing a situation completely permeated by violence and as affording no ray of hope that the defendant would engage in other than violent picketing."

The Busch case, in other words, even as explained in the May's case, in one sense introduces no new rule of law, but merely defines the old rule in different language. The blanket injunction still exists in New York, in spite of subdivision f(5) of the state anti-injunction act,⁸⁶ which insulates from injunction in cases involving "labor disputes": "Giving publicity to and obtaining or communicating information regarding the existence of, or the facts involved in, any dispute, whether by advertising, speaking, picketing, patrolling any public street or any place where any person or persons may lawfully be, or by any other method not involving fraud, violence or breach of the peace."

In another sense, however, the Busch case and especially the May's case have emphasized the necessity for the existence of extreme violence or an extreme situation of lawlessness as conditions to the issuance of a blanket injunction. Mechanical application by lower courts of the blanket injunction in situations where simply the taint of unlawfulness existed undoubtedly continued even after the Court of Appeals decisions in *Nann v. Raimist*,⁸⁷ *J. H. & S. Theatre v. Fay*,⁸⁸ and *Wise Shoe Company v. Lowenthal*.⁸⁹ This was indicated in the case of *Bailis v. Fuchs*⁹⁰ where the lower court issued a blanket injunction for the reason, among

⁸⁶ § 876-A New York Civil Practice Act. (1932).

⁸⁷ 255 NY 307, 174 NE 690, 73 (1935).

AJR 669 (1931).

⁸⁸ 260 NY 315, 183 NE 509 (1940).

⁸⁹ 266 NY 264, 194 NE 749

(1935).

⁹⁰ 283 NY 133, 27 NE(2d) 812

others, that the union had overstepped the boundaries of lawfulness. The Court of Appeals reversed, holding that the lower court had made no finding that peaceful picketing was impossible. "The power of the courts", said the court "to enjoin violence in a 'labor dispute' is beyond question and when necessary, this power may even authorize a prohibition of all picketing. Such was the case in *Busch Jewelry Co. v. United Retail Employees Union*." But, said the court, "the obstacle which prevents our applying that authority to the present appeal is that here we have no finding by the trial court that peaceful picketing is impossible. In the absence of such a finding or one establishing the necessity of injunctive relief against all picketing as the only practical method of assuring the continuance of order, we are under the command of the statute so to formulate relief as to permit the unionists their unquestioned rights to picket peacefully."

Section 128. Remedies for Excessive Picketing—Injunctions Against False Bannering.

It has long been well settled that injunctions are properly issuable for false bannering in connection either with picketing or boycotting.⁹¹ Labor has contended that equity has, in issuing injunctions against such false bannering, disregarded and virtually abrogated in labor cases, an otherwise generally applied underlying principle governing equity proceedings, viz., that equity will not restrain a falsehood, even though constituting a libel; the sole remedy is an action at law for damages. Two reasons have been advanced for equity's refusal to extend injunctive relief to defamation cases. The first proceeds upon the ground that libel and slander affect a personal and not a property right, and are consequently beyond the scope of equity's jurisdiction as historically understood.⁹² The second objection is

91. See cases *supra*, section 126

92. *Francis v. Flinn*, 118 U.S. 395, 6 S. Ct. 1148, 30 L. Ed. 165 (1886); *Kidd v. Horry*, 28 F. 773 (CC. ED. Pa. 1886); *Singer v. Domestic Sewing*

Machine Co., 49 Ga. 70 (1873);

Thompson v. Delicatessen Workers Union, 126 N.J. Eq. 119, 8 A.(2d) 130 (1939); *Marlin Firearms Co. v. Shields*, 171 N.Y. 384, 64 N.E. 103

[1 Teller]

found in the principle of constitutional law guaranteeing the right to free speech. "Principles of free government," says Dean Pound,⁹³ "require that preventive justice be in abeyance where the wrongs complained of involve printing, publishing or writing. . . . Equity has no jurisdiction as a censor of publications."⁹⁴ The matter has been well expressed in *Marx Jean Clothing v. Watson*:⁹⁵ "The two ideas, the one of absolute freedom to say, write or publish whatever he will on any subject coupled with the responsibility therefor, and the other idea of preventing such free speech, free writing, or free publication, cannot co-exist."⁹⁶ Nevertheless, injunctions have been freely issued, restraining false and misleading banners, and this even though the falsity were not such as to constitute a libel. Courts which

(1902); *Zenie v. Miskend*, 245 AD 634, 284 NYS 63 (1935, aff'd 270 NY 636, 1 NE(2d) 367 (1936)); *Dartmore Corp. v. Columbia Products Corp.* 102 NYLJ 1554 (November 9, 1939). *Contra* *Price Hollister Co. v. Warford* 18 F(2d) 129 (DC SD NY 1926); *Maytag Co. v. Meadows Mfg. Co.* 35 F(2d) 403 (CCA 7, 1929); *H E Allen Mfg Co v Smith*, 224 AD 187, 299 NYS 692 (1929). *E Hall Downes et al v Fly Culbertson et al*, 276 NYS 235 (1934). See also *Menard v Houle*, 11 NE(2d) 136 (Mass 1937). See, for an excellent discussion in critical tone of the rule above stated, Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 *Harv L Rev* 640. See also Long, *Equitable Jurisdiction to Protect Personal Rights* (1923) 33 *Yale LJ* 115; *Derenberg, Trade Mark Protection and Unfair Trading* (1936) pp. 137-150. In England, too, the door of Chancery was closed to the victim of libel. *Prudential Ins. Co. v. Knott*, LR 10 Ch App 142 (1875). But by the Judicature Act of 1875, the arm of equity was extended to defamation. Even today, however, in Eng-

land, injunctions in libel cases are issued with the utmost of caution. *Bonnard v. Perryman*, Ct of Appeal [1891] 2 Ch 269.

⁹³ Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916) 29 *Harv L Rev* 640 648.

⁹⁴ Additional reasons alleged against the propriety of granting injunctions in restraint of libel and slander is that it contravenes the guarantee of right to trial by jury, and the rule that equity ought not to intervene where the law remedy is adequate, as by assessing damages or prosecuting for crime. *Derenberg, Trade Mark Protection and Unfair Trading* (1936) p. 139. It has been held that where a publication has been found after trial by jury to be false and defamatory, equity will intervene to enjoin repetition of the publication. *Wolf v. Harris*, 267 Mo 405, 184 SW 1139 (1916); *Flint v. Hutchinson Smoke Burner Co* 110 Mo 492, 19 SW 804 (1892).

⁹⁵ 168 Mo 135, 67 SW 391 (1902).

⁹⁶ See also *Grosjean v. American Press Co.* 297 US 233, 56 S Ct 444, 80 L Ed 660 (1936).

issue injunctions in restraint of false bannerings seem to assert a right to do so upon the ground that falsity renders picketing unlawful, and that the injunction is consequently directed not against the falsehood but against the unlawful picketing. Such a view is involved in the patent fallacy of begging the issue by basing relief upon a generalized conclusion (unlawful picketing) in order to obviate the objection of a premise (falsehood) generally beyond the jurisdiction of equity to enjoin.⁹⁷ Another reason which equity courts (in the majority of jurisdictions) have assigned in picket and especially in boycott cases to enjoin false publications proceeds upon a distinction without a difference. The libel is said to be coercive in nature, "the view being taken that suits of this character are not suits to enjoin a libel or slander, but to enjoin acts the effect of which is to injure a person's business by coercing others through fear of loss to themselves to refrain from having any business relations with him."⁹⁸ Several jurisdictions, recognizing that the coercion is but the result of the spreading of falsehood or libel generally asserted to be beyond the jurisdiction of equity to enjoin, have refused to extend the mandate of injunction.⁹⁹

It has been suggested in one case that continuing libels are different from ordinary libels and hence can be enjoined. In *Swing v. American Federation of Labor*,¹ the court said: "It is unnecessary for us to decide whether or not a court of equity will enjoin a threatened libel because that kind of a case is not before us. We have here for consideration an accomplished and continuing libel which is quite a different thing, and we fail to see that it is in any

97. See *People ex rel Broder v Heller*, 106 Misc 155, 2 NYS(2d) 352 (1938) holding that false bannerings by pickets, though enjoinable, does not render the pickets liable to prosecution for disorderly conduct. Such a holding flies in the face of the viewpoint discussed in the text.

98. 32 CJ 174

99. *Truax v. Beebe*, 19 Ariz 379, 404

171 P 121 (1918), *Marx Jean Clothing Co. v. Watson*, 168 Mo 135, 67 SW 391 (1902), *Lindsay v. Montana Fed of Labor*, 37 Mont 264, 96 P 127 (1908); *Ex parte Tucker*, 220 SW 75 (Tex 1920)

1 372 Ill 91, 22 NE(2d) 357 (1939), cert. den. for want of a final judgment, 310 US 620, 60 S Ct 108, 84 L Ed 1393 (1940).

way different from any other form of continuing trespass."²

Section 129. Remedies For Excessive Picketing—Who May Enjoin.

Excessive or otherwise illegal picketing, strikes or boycotts may be enjoined at the instance not only of the owner of the business involved, but also by proceedings instituted by those having a direct economic interest in the controversy. Thus it has been held that those deprived of the service of a public utility in consequence of a strike, may sue to enjoin the strike.³ So too an operator of a mine, though not the owner thereof, has been permitted to seek injunctive relief against alleged wrongful labor activities.⁴ One under contract with a manufacturer has been permitted to sue for the purpose of enjoining a strike by the manufacturer's employees,⁵ and accordingly it has been held that a sales agent of a coal company who, in reliance upon his contract with the coal company, has in turn entered into contracts for the sale of coal, can himself sue to enjoin unlawful acts by employees of the coal companies.⁶ Bondholders of a business have been permitted to enjoin illegal acts threatening to destroy the business, the court holding that in such a case no previous demand upon the mortgage trustee is necessary to justify the bondholders' action.⁷ In one case an employers' association was permitted to seek an injunction in restraint of unlawful employee conduct di-

2. *c/f* cases, *supra*, holding that an action at law is necessary, to establish the existence of legal wrong, before equity may be asked to intervene for the purpose of preventing further repetition.

3. *Stephen v. Ohio State Telephone Co.* 240 F 759 (DC ND Ohio 1917).

4. *Goldfield Consolidated Mines Co. v. Goldfield Miners Union*, 159 F 500 (CCD Nev 1908).

5. *Dail-Overland Co. v. Willys Overland*, 263 F 171 (DC WD Ohio 1919), *aff'd sub nom. Quinlivan v. Dail Overland*, 254 F 56 (CCA 6, 1921).

But one who has a contract with another to purchase goods manufactured by X may not sue to enjoin alleged unlawful acts of X's employees, because of remoteness of interest.

6. *Chesapeake & O Coal Agency Co. v. Fire Creek Coal & Coke Co.* 119 F 942 (CC SD W Va 1903), 124 F 305, 61 CCA 49 (CCA 4, 1903).

7. *Carter v. Fortney*, 170 F 463 (CC ND W Va 1909). See also *Fortney v. Cartner*, 203 F 454, 121 CCA 514 (CCA 4, 1913), *Jennings v. United States*, 264 F 390 (CCA 8, 1920).

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rected against all the members of the association,⁸ the court in this case, however, indicating that such an action might not be maintainable were less than all of the members of the association involved.⁹

Section 130. Picketing in Jurisdictional Disputes Cases— General Statement.

The Labor movement has had its full share of separatism. The score of years which rounded out the 19th century witnessed the Knights of Labor on the one hand, and the American Federation of Labor on the other, each competing for supremacy. Recent years have seen the American Federation of Labor in competition with the Congress of Industrial Organizations. Incidents of progress and change have also bred jurisdictional disputes. Thus carpenters' unions have insisted upon domain over steel doors where wooden doors had theretofore been used. And recently, the marble workers union argued with the housewreckers union over jurisdiction to raze the Soviet pavillion at the New York World's Fair.¹⁰ Still a third cause of separatism has been dissatisfaction among union members over particular leadership, either because the leadership is alleged to be too conservative, too radical, or dishonest. When, for one reason or another, the dissatisfied group is unable to overcome those in control, it branches off into an independent union. The repercussions of jurisdictional disputes have naturally found their way into the law books.

The first important reported instance of a jurisdictional dispute is the English case of *Allen v. Flood*,¹¹ which involved a jurisdictional strike. There it appeared that the plaintiffs were shipwrights employed on the repairs to the woodwork of a ship. Ironworkers employed on the iron-

8. *Garside v. Hollywood*, 88 Misc 311, 150 NYS 647 (1914).

9. *c/f American Fur Mfrs. Ass'n v. Associated Fur Co. & T. Mfrs.* 161 Misc 246 291 NYS 610 (1936), *aff'd* 251 AD 708, 296 NYS 1000 (1937): "Since different and separate acts of violence are alleged as to some of

the defendants by some of the plaintiffs other than plaintiff association, each of the plaintiffs should start a separate action based thereon."

10. *New York Times*, December 8, 1939, p. 1.

11. *House of Lords* [1898] AC 1.

work of the ship objected to the plaintiffs being employed, upon the ground that they had previously worked at iron-work on a ship for another firm. It appeared that the practice of shipwrights working on iron was resisted by the trade union of which the ironworkers were members. The defendant, a delegate of the union, threatened to call a strike unless the plaintiffs were discharged, upon which the employers, in fear that the threat would be carried out, discharged them. The plaintiffs showed all these facts, but were nevertheless held remediless. The case was decided the way it was because the law then understood imperfectly the right to a free and open market,¹² the courts clinging instead to what might be called the pigeon-hole notion of the law of torts which recognized no liability for any but traditionally known wrongs.¹³

Section 131. Picketing in Jurisdictional Disputes Cases— Legality at Common Law.

*Stillwell Theatre, Inc. v. Kaplan*¹⁴ is outstandingly associated with the permissibility of picketing in jurisdictional disputes cases. The plaintiff, a proprietor of a moving picture theatre, entered into a collective bargaining agreement with the Empire State Motion Picture Operators Union, Inc., which contract was to run from September 1, 1930, to August 31, 1931. It appeared that there was another and older labor union among moving picture operators, known as Local 306 of the International Alliance of Theatrical Stage Employers and Moving Picture Operators Union, affiliated with the American Federation of Labor, which Union (hereafter called the defendant) proceeded to picket the plaintiff's premises with full knowledge of the contract entered into by the plaintiff with the Empire State Union. Both the defendant and the Empire State Union contended for control of the motion picture theatre industry. The picketing was

¹² For an analysis of the right to the free and open market, see sections 11-23, *supra*.

¹³ For a statement of the "pigeon-hole" notion of the law of torts, see section 74, *supra*.

¹⁴ 250 NY 405, 182 NE 63, 84 ALR 6 (1932), rehearing denied, 260 NY 563, 184 NE 93, 84 ALR 12 (1932), cert den 288 US 606, 33 S Ct 307, 77 L Ed 981 (1933).

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part of a plan to gain that control. It was conceded first, that the picketing was peaceful and that the placards carried by the pickets bore truthful statements; second, that the defendant in picketing the theatre was activated by the ultimate desire to improve labor conditions, and third, that the Empire State Union was a bona fide union. The plaintiff contended that the defendant's picketing was illegal and susceptible of injunctive relief as seeking to induce the breach of a legally enforceable collective bargaining contract entered into by the plaintiff with the Empire State Union.¹⁵ The court, however, denied the plaintiff's application, holding that the resulting injury from peaceful picketing was incidental and had to be endured. The defendant union, said the court, "addressed itself to the public . . . no one was asked to break any contract. The collateral result of the attempted persuasion of the public not to patronize the theatre while it employed workers of the rival union might make it unprofitable for the employer to go on with the contract, but to state fairly and truly to the public, that the conduct of the employer is socially objectionable to a labor union is no persuasion to break a contract. To grant the plaintiff's application for an injunction would be "to give to one labor union an advantage over another by prohibiting the use of peaceful and honest persuasion in matters of economic and social rivalry. . . . It is not within the province of this court to restrain conduct which is within the allowable area of economic conflict."¹⁶

15. That collective bargaining agreements are legally enforceable contracts is the undoubted New York law. See *Goldman v. Cohen*, 227 NYS 311 (1938); *Ribner v. Rasco Butter & Egg Co.* 238 NYS 132 (1929); *Schlesinger v. Qunto*, 194 NYS 401 (1922). It is to be noted, however, that a suit to enforce a collective bargaining agreement, or to enjoin its violation, has been said by the New York Court of Appeals and held in lower courts (other lower

court holdings to the contrary, however) to constitute a "labor dispute" under the State Anti Injunction Act so as to be unsusceptible of equity's intervention in the absence of a showing of the requirements which, under the Act, condition the issuance of equity's mandates. See *infra*, sections 177, 445.

16. Accord: *Glover v. Parson*, 103 Ind App 569, 9 NE(2d) 109 (1937); *Nann v. Raimist*, 255 NY 307, 174 NE 690, 73 ALR 669 (1931); *Blanch-*

The holding in the Stillwell case has been assailed as serving unjustly to subject the rights of the employer to internal conflicts of labor.¹⁷ In Oregon, a 1939 amendment to the labor statutes of that state provides that "jurisdictional controversies between labor organizations or groups of employees are not labor disputes, and a refusal by an employer to recognize either party to such controversy does not operate to make the dispute a labor dispute",¹⁸ and a

ard v Golden Age Brewing Co 188 Wash 396, 63 P(2d) 397 (1936), Kimbel v Lumber Union, 189 Wash 416, 65 P(2d) 1066 (1937) (where employees are some of them members of one union and some of them members of another. Alter, however, where the picketing union has no members who are employed by the picketed employer. United Union Brewing Co v Beck, 100 Wash Dec 412, 93 P(2d) 772 (1939)). Contra California Brewers Institute v Dave Beck (DC WD Mo August 14, 1937), Watertown Employers of Portland v CIO (DC WD Mo January 15 1938), Burt v. United Automobile Workers, — (San Francisco, 1940), Goyette v. Watson, 245 Mass 577, 140 NE 285 (1923), Brickley Dairy Co v. United Dairy Workers, 2 CCH Lab Cas 626 (Wayne Co Circuit Ct Mich 1940); Wetman Construction Co v Bert A. Knight, et al. — (Mich 1940). See also Stalban v Friedman, 171 Misc 106, 11 NYS(2d) 343 (1939) reversed 258 AD 516, 17 NYS(2d) 144 (1940), where the Stillwell case (supra) was held by the lower court inapplicable where the employer is a small entrepreneur rather than a large business organization. In the former case, said the lower court in the Stalban case (supra), the social benefit flowing from small business ventures requires labor unions to desist from jurisdictional picketing detrimental to the

neutral employer. The appellate court reversed the holding of the lower court because the controversy constituted a "labor dispute" and the picketing was hence unenjoinable in the absence of a showing of pre-conditions set forth in the Anti-Injunction Act.

It has been held that where the dispute is not between two unions, but is rather an internal union dispute, picketing does not constitute a "labor dispute" under the State Anti-Injunction Act, and hence may be enjoined. Trommer v Brotherhood of Brewery Workers, NYLJ, March 16, 1938, p. 1299. The same is true where the dispute involves two labor unions which are locals of the same parent organization. Silver Dollar Bakeshop v Weissman 103 NYLJ 2020 (1940).

17. See O'Brien, J., dissenting in Stillwell Theatre v Kaplan 259 NY 405, 182 NE 63, 84 ALR 6 (1932), rehearing denied, 260 NY 563, 184 NE 93, 84 ALR 12 (1932), cert. den. 288 US 606, 53 S Ct 397, 77 L Ed 981 (1933). See also Esco Operating Corporation v Kaplan, 258 NYS 303 (1932). "the ultimate effect of the Stillwell decision upon New York's treatment of labor unions must remain undetermined until the various difficulties which it raises are thoroughly comprehended." Note (1932), 44 Harv. L. Rev. 124, 132.

18. L. 1939, c. 2.

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similar statute was enacted the same year in Pennsylvania.¹⁹ In Ohio, the illegality of picketing in the absence of a strike is placed partly upon the ground that jurisdictional picketing by unions hostile to each other would otherwise result.²⁰ The Stillwell decision probably proceeded upon the court's desire, however, to forestall the development of employer-dominated unions as springboards for injunctive relief against picketing by bona fide labor unions. A case in point is the Kentucky case of *Hotel v. Miller*.²¹ There employees formed a company union. A bona fide labor union thereafter commenced to picket. Although Kentucky generally permits picketing in the absence of a strike,²² picketing was enjoined in the Miller case because the company union had entered into a collective bargaining agreement with the employer. Other instances are to be found to explain if not to support the Stillwell decision. In *United Bakers Workers Union v. Messing*,²³ the plaintiff union was denied an injunction because, far from being a bona fide union, it was rather a band of scab workers preying on organized labor. In *Spink v. International Alliance*,²⁴ striking members of the Alliance union were replaced by a group of workers calling themselves "American Federation of Motion Picture Operators." An injunction was nevertheless denied because the court found the latter group to be spurious and not genuine union men.

In *Tankin v. Hotel & Restaurant Workers Union*,²⁵ an employer whose C. I. O. union employees struck, went to an A. F. L. union and entered into a contract with it, with the view thereby of terminating the controversy, and enjoining further picketing by his striking employees. An injunction was denied, the court holding that such a controversy was not a jurisdictional dispute contemplated by a 1939 amendment to the Pennsylvania anti-injunction act

19. L. 1939, Assembly Act No 163.

20. *Crosby v. Rath*, 136 Oh St 352 (1940).

21. 272 Ky 466, 114 SW(2d) 501 (1938).

22. *Music Hall Theatre v. Moving Picture Mach. Operators*, 249 Ky 639, 410

61 SW(2d) 283 (1933).

23. N. Y. L. J. Feb. 19, 1926, p. 2040.

24. Am. Fed. of Labor Leg. Inf. Bulletin 25 (1932) Ct Com. Pleas, Northampton Co. (Pa. 1931).

25. 36 Pa. D & C 537 (1939).

which permitted injunctions in such disputes. Mention should also be made in this connection of statutes such as the New York anti "kick-back" law,²⁶ and the Federal Wage and Hour Law,²⁷ which accord legal consequences to collective bargaining agreements, but only if they involve "bona fide" unions.

**Section 132. Picketing in Jurisdictional Disputes Cases—
Effect of Labor Relations Acts, and Anti-Injunction
Legislation.**

In a number of cases the courts have been asked to deal with the contention that the holding of the court in the Stillwell case, or the legality in general of picketing or boycotting in connection with jurisdictional disputes, have been affected by the enactment of the National and State Labor Relations Acts,²⁸ and this in spite of anti-injunction legislation.²⁹ The reasoning common to such cases will be analyzed in preface to a statement of the holdings of the cases.³⁰ The Labor Relations Acts provide (in the connection applicable here) first, for the machinery whereby exclusive workers' representatives in appropriate units are to be designated or certified for purposes of collective bargaining. They further direct collective bargaining between employer and the union or other agent which constitute the workers' exclusive bargaining representative so designated or certified. Finally, they condemn as an unfair labor practice, domination over or interference by an employer with the affairs of his employees' union organization. On three counts, therefore, it is con-

26. N. Y. Penal Law, Section 962

27. Fair Labor Standards Act of 1938 Act of June 25, 1938. 52 Stat. 1060, 29 USCA Secs 201 et seq

28. The states of New York (L. 1937, ch 443), Massachusetts (Act 1938, ch. 345), Wisconsin (L. 1939, ch. 57), Pennsylvania (L. 1937, No 204), Utah (L. 1937, ch 55), Michigan (Acts of 1939, No. 176) and Minnesota (Acts of 1939, ch. 440) have thus far enacted labor relations acts

more or less closely patterned upon the National Labor Relations Act (49 Stat 449, 29 USCA §§ 150-166). The Acts are discussed *infra*, at chapter twenty one

29. 47 Stat 70 (1932), 29 USCA secs 101-115

30. See *infra*, section 211, for a further statement of the problem in connection with the Norris Act, and for a tabulation of the cases appropriate to that Act.

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tended that the holding of the Stillwell case should become bad law. In the first place, the Labor Relations Acts are asserted to have undertaken the task which the court in the Stillwell case may have refused to assume—that of determining whether a given labor organization is or is not a bona fide, undominated and independent union. In the second place, they have provided for the selection of one and only one representative for the purpose of collective bargaining, and finally, they have provided that only this bargaining representative, so selected, shall bargain collectively with the employer. Under this viewpoint, the pickets in the Stillwell case would perforce be treated with much less deference today. They would be interfering with the performance of a contract entered into by direction or at least under protection of law, to wit, the New York State Labor Relations Act. Moreover, they would in effect be coercing the performance of an illegal act, for the employer is forbidden by law to bargain with any but the proper bargaining representative of his employees.³¹

The federal courts have not been entirely receptive to the above reasoning. Picketing has been enjoined as not constituting a labor dispute under the Norris Act³² after certification of one of the competing unions by the National Labor Relations Board,³³ but the contrary is held where

31. See *Busch Jewelry Co. Inc. v. United Retail Employers Union Local 830, et al* 170 Misc 482 10 NYS (2d) 519 (1939), where the court said: "If the employees objecting to the closed shop award of the arbitrators in fact represent the majority of the Busch employees, it is clear that plaintiff companies in entering into such a closed shop agreement with defendant unions, pursuant to the arbitration award would be guilty of an unfair labor practice under section 704 (5) of the State Labor Relations Act." The court also stated that "if the petitioning employees do in fact represent a majority of all the Busch employees a

contract forcing membership in defendant unions upon them is clearly illegal (State Labor Relations Act)." Accord: *Tobin v. Capital City Dress Co. 1 CH Lab Cas 478 (Pa 1938)*. *Contra*, provided the contract is uncontested by a majority group: *Wisconsin Shoe Workers v. Labor Relations Board* (Wisconsin, 1938).

32. 47 Stat 70 (1935), 29 USCA sections 101-115.

33. *Oberman v. United Garment Workers*, 21 F Supp 20 (DC WD Mo 1937). Accord: *Euclid Candy Co. v. Summa*, 174 Misc. 19, 19 NYS(2d) 382 (1940) where, however, the election was held pursuant to a contract

similar relief is sought before certification,³⁴ although there

which limited the right to strike or picket. The case stands, in a narrow sense, for the proposition that striking or picketing in violation of agreement is illegal and may be enjoined.

The tacit assumption of the Oberman case, to the effect that the National Labor Relations Act has superseded the prior enacted Norris Act to the extent necessary to carry out the purposes of the former Act has been challenged in the case of *International Brotherhood of Teamsters v. International Union*, 106 F(2d) 871 (CCA 9, 1939) where the court said "Nor is there merit in the contention that Congress in the National Labor Relations Act has given either this or the district court a power to enjoin in the case before us greater than that permitted by the Norris-La Guardia Act. The description of a labor dispute is the same in each Act."

34 *Lund v. Woodenware Workers Union*, 19 F Supp 607 (DCD Minn Third Division 1937); *Cole v. Atlanta Terminal Co.* 15 F Supp 131 (DC ND Ga Atlanta Division 1936); *Grace Co. v. Williams* 20 F Supp 263 (DC WD Mo WD 1937); *aff'd* 96 F(2d) 478 (CCA 8, 1938); *Cupples Co. v. American Federation of Labor*, 20 F Supp 894 (DC ED Mo ED 1937); *Fur Workers Union, Local No. 72 v. Fur Workers Union*, 308 US 522, 60 S Ct 292 84 L Ed 443 (1939), *aff'g* 105 F(2d) 1 (CA DC 1939); *Blankenship v. Kurfman*, 96 F(2d) 450 (CCA 7, 1938); *Sharp & Dohme v. Storage Warehouse Employees Union*, 24 F Supp 701 (DC ED Pa, 1938).

See also the extended litigation reported under the title of *Donnelly Garment Co. v. International Ladies Garment Workers Union*. The plain-

tiff having entered into a collective bargaining agreement with the Donnelly Garment Workers Union (a company union), sued to enjoin picketing, among other things, by the defendant union. The defendant resisted the granting of the relief sought upon the ground that a labor dispute was involved within the purview of the Norris Act. The plaintiff, however, asserted otherwise by reason substantially of the reasoning set forth in the text. The Donnelly Garment Workers Union intervened and alleged that if the court should construe the Norris Act as involving a 'labor dispute' in the instant case, the Act as thus construed would be unconstitutional. A temporary restraining order was entered. 20 F Supp 767 (DC WD Mo WD, 1937). The defendant's motion to dismiss the complaint after hearing by a court of three judges was denied and a temporary injunction granted against the defendant. 21 F Supp 807 (DC WD Mo WD 1937). Upon direct appeal to the Supreme Court of the United States, the decree was vacated and the case remanded, upon the ground that the case, not having involved a suit to restrain the enforcement of a Congressional Act, should not have been heard by a court of three judges, nor appealed directly to the Supreme Court. 304 US 243, 58 S Ct 875, 82 L Ed 1316 (1938). Thereupon both plaintiff and intervenor amended their complaints to add thereto allegations designed to meet the procedural requirements of the Norris Act. The defendant then moved to dismiss the amended complaints, and the motion was granted, the court now holding that a controversy existed which was a labor dispute under the Norris Act, and that the com-

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tended that the holding of the Stillwell case should become bad law. In the first place, the Labor Relations Acts are asserted to have undertaken the task which the court in the Stillwell case may have refused to assume—that of determining whether a given labor organization is or is not a bona fide, undominated and independent union. In the second place, they have provided for the selection of one and only one representative for the purpose of collective bargaining, and finally, they have provided that only this bargaining representative, so selected, shall bargain collectively with the employer. Under this viewpoint, the pickets in the Stillwell case would perforce be treated with much less deference today. They would be interfering with the performance of a contract entered into by direction or at least under protection of law, to wit, the New York State Labor Relations Act. Moreover, they would in effect be coercing the performance of an illegal act, for the employer is forbidden by law to bargain with any but the proper bargaining representative of his employees.³¹

The federal courts have not been entirely receptive to the above reasoning. Picketing has been enjoined as not constituting a labor dispute under the Norris Act³² after certification of one of the competing unions by the National Labor Relations Board,³³ but the contrary is held where

31. See *Busch Jewelry Co. Inc. v. United Retail Employers Union Local 830*, et al 170 Misc 482 10 NYS (2d) 519 (1939), where the court said: "If the employees objecting to the closed shop award of the arbitrators in fact represent the majority of the Busch employees, it is clear that plaintiff companies in entering into such a closed shop agreement with defendant unions, pursuant to the arbitration award would be guilty of an unfair labor practice under section 704 (5) of the State Labor Relations Act." The Court also stated that "if the petitioning employees do in fact represent a majority of all the Busch employees a

contract forcing membership in defendant unions upon them is clearly illegal (State Labor Relations Act)." Accord *Tobin v. Capital City Dress Co.* 1 CCH Lab Cas 478 (Pa 1938). *Contra*, provided the contract is uncontested by a majority group: *Wisconsin Shoe Workers v. Labor Relations Board* (Wisconsin, 1938).

32. 47 Stat. 70 (1935), 29 USCA sections 101-115.

33. *Oberman v. United Garment Workers*, 21 F Supp 20 (DC WD Mo 1937). Accord: *Euclid Candy Co. v. Summa*, 174 Misc. 19, 19 NYS(2d) 382 (1940) where, however, the election was held pursuant to a contract

similar relief is sought before certification,³⁴ although there

which limited the right to strike or picket. The case stands, in a narrow sense, for the proposition that striking or picketing in violation of agreement is illegal and may be enjoined

The tacit assumption of the *Oberman* case, to the effect that the National Labor Relations Act has superseded the prior enacted Norris Act to the extent necessary to carry out the purposes of the former Act, has been challenged in the case of *International Brotherhood of Teamsters v. International Union*, 106 F(2d) 871 (CCA 9, 1939) where the court said "Nor is there merit in the contention that Congress in the National Labor Relations Act has given either this or the district court a power to enjoin in the case before us greater than that permitted by the Norris-La Guardia Act. The description of a labor dispute is the same in each Act."

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is a decision holding that even before certification an injunction will issue to restrain picketing under such circumstances, where a certification proceeding is pending before the Board.³⁵ Complication is aggravated by the existence of a collective bargaining agreement entered into between an employer and a union which, at the time of execution of the contract, represented the majority of the employees in an appropriate bargaining unit. Change of affiliation to a competing union thereafter creates a new bargaining agent dissatisfied with the terms of the bargain entered into by the contracting union. Injunctive relief against picketing has been granted to the employer upon the theory that no "labor dispute" was involved.³⁶

plaint was defective because not containing an allegation that every reasonable effort was made to settle the dispute 23 F Supp 998 (DC WD Mo WD 1938). Upon appeal to the Circuit Court of Appeals, the holding of the district court was reversed "since it clearly appears from the facts pleaded that any effort on their part to settle the dispute would have violated the duty which they owed to their employees under the terms of the National Labor Relations Act and under their contract with their employees and would have been useless and unreasonable" 99 F(2d) 309 (CCA 8, 1938), cert. den 305 US 602, 59 S Ct 304, 83 L Ed 430 (1939).

Sequel: On March 6, 1940, the National Labor Relations Board handed down its decision holding the Donnelly Garment Workers Union to be a company dominated labor organization in violation of Section 8(2) of the National Labor Relations Act. The Board accordingly directed the Donnelly Garment Company, respondent, to withdraw all recognition from the union, to disestablish the same, and also to reimburse employees for the dues

checked off on behalf of the union. Donnelly Garment Company, 20 NLRB No 24 (1940).

35. *Union Premier Food Stores v. Retail Food Clerks*, 98 F(2d) 821 (CCA 3, 1938). *Contra* *Cupples v. American Federation of Labor*, 20 F Supp 894 (DC ED Mo ED 1937).

36. *M. & M. Woodworking Co v. Plywood & Veneer Workers Union*, 23 F Supp 11 (DCD Or 1938). (Actual issuance of the injunction was withheld pending amendment of the complaint), *United Electric Coal Companies v. Rice*, 80 F(2d) 1 (CCA 7, 1935), cert. den. 297 US 714, 56 S Ct 590, 80 L Ed 1000 (1936). *c/f* *Lauf v. Shinner*, 303 US 323, 58 S Ct 578, 82 L Ed 872 (1938). It is to be noted that all the cases which have arisen under the Norris Act in the connection with the National Labor Relations Act discussed in the text, have involved competing unions claiming membership within the employer's plant. The analogue to the Stillwell Case (*Stillwell Theatre Co. v. Kaplan*, *supra*) which involved an outside union, has yet to come before the federal court (But see *Lauf v. Shinner*, 303 US 323, 58 S Ct 578, 82 L Ed 872 [1938]). It would seem

Federal court holdings in connection with the meaning of the words "labor dispute" under the Norris Act are, as will hereafter more fully be stated and explained,³⁷ based upon somewhat different legal reasoning from holdings related to comparable state laws. The Norris Act has a different constitutional source from prototype State Anti-Injunction legislation. Indeed, the Norris Act is said to be a virtual deprivation of federal court jurisdiction over labor disputes, regardless of the background of such disputes, where no fraud or violence exists.³⁸ State courts, however, have generally so interpreted state anti-injunction statutes as not to deprive judicial jurisdiction over substantive labor law, with the result that state court holdings interpreting the words "labor dispute" reflect insistence by such state courts upon testing, in the light of public policy, the lawfulness of purpose in connection with the given form of labor activity, and otherwise controlling the activity. In two main state court cases the question was raised whether picketing by an outside or an inside minority union is legal where the employer has theretofore entered into a collective bargaining agreement with the proper bargaining agency of his employees after that agency has been certified by the National or State Labor Relations Board. In *Stalban v. Friedman*,³⁹ the lower court held, in accordance with the reasoning heretofore stated, that picketing by an outside union was illegal where the employer had theretofore contracted with the proper bargaining agency of his employees pursuant to certification by the State Labor Relations Board. The Appellate Division, First Department,

that the position of the outside union should be no worse and perhaps a little better than that of the competing inside union, unless the bargaining unit proposed by the outside union is the same as that of the union sought to be replaced. But in this connection must be considered the general and apparently increasing hostility of the law to picketing in the absence of a strike. See *supra*, section 117.

See, for a discussion of the effect of existing contracts upon the right to certification by the National Labor Relations Board, *infra*, section 335

37. See *infra*, section 436

38. See *New Negro Alliance v. Sanitary Grocery Company*, 303 US 552, 58 S Ct 702, 82 L Ed 1012 (1938); *Lauf v. Shinner*, 303 US 323, 58 S Ct 578, 82 L Ed 872 (1938).

39. 178 Misc 106, 11 NYS(2d) 343 (1939).

however, reversed,⁴⁰ holding that the picketing under the circumstances constituted a "labor dispute" under the State Anti-Injunction Law. "The question is not affected by the fact, if it be a fact", said the court, "that the State Labor Relations Board has held that the union, whose members are now employed by the plaintiff, is the proper agency for collective bargaining."⁴¹

A contrary holding is contained in the decision of a Washington court in *Bloedel Donovan Lumber Mills v. International Wood Workers of America*.⁴² In that case it appeared that the defendant union had lost to an A. F. L. union an election held by the National Labor Relations Board to determine the proper bargaining agency of the plaintiff's employees. Thereupon, the plaintiff entered into a closed shop agreement with the A. F. L. union. The defendant commenced to picket. It was contended that picketing under such circumstances was illegal in spite of the State Anti-Injunction Law, and the court so held, saying as follows: "Certainly, if there is to be economic peace and orderly adjustment of the question who, as between two contesting unions, shall be the exclusive bargaining agency of employees, such unions, as well as the employer, should be bound by the certificate made by the National La-

40 259 AD 520, 19 NYS(2d) 978 (1940)

41. See also *Fairbanks Cube Steak House, Inc. v. Viera*, 259 AD 804, 19 NYS(2d) 776 (1940). In this case "an examination of the record on appeal discloses that the plaintiff, a restaurant owner, sought to enjoin the defendant union from picketing its premises. There were no members of the defendant union who were employees of plaintiff. Despite the fact that the New York State Labor Relations Board had certified that another union was the exclusive bargaining representative for the plaintiff's employees, the court denied the motion. While neither the court below nor the Appellate Division wrote

an opinion in the case it is evident from the record on appeal that the only question before the court was that as to whether or not there was a 'labor dispute' in the case." *Hookey, J., in Brook-Maid Food Company, Inc. v. Goldberg*, 104 NYLJ 6 (Sp. T. Part 1, Kings Co., 1940). In the *Brook-Maid Food Company Case*, it was held that where an employer, under contract with a labor union, enters into an agreement with his employees upon their withdrawing from the labor union on termination of the contract, he may not enjoin picketing carried on by the labor union.

42. 104 Wash Dec 80, — P(2d) — (1940).

bor Relations Board, which has, in a case such as here presented, been given by Congress the exclusive initial jurisdiction to make that determination. Also, such contesting unions and their members, as well as the employer, should be bound by agreements made and entered into in good faith, as was the working agreement of April 17th and the proposal of October 2, under and pursuant to the provisions of the Wagner Act."

In accord with the Washington case is a Pennsylvania case, *Pando v. Bartenders' International Alliance*,⁴³ where it appeared that an A. F. L. union picketed an employer who had theretofore entered into a contract with a C. I. O. union to which all of his employees belonged.⁴⁴

Section 133. Jurisdictional Picketing under the Sherman Act.

The view has been taken by Assistant Attorney General Thurman Arnold that jurisdictional labor activity is an unreasonable activity, and hence, if restraining interstate commerce, subject to criminal prosecution under the Sherman Anti-Trust Act,⁴⁵ but it has been held by a United States district court that jurisdictional striking, picketing and boycotting carried on in connection therewith, are legitimate labor activities, not punishable, therefore, under the Sherman Act.⁴⁶ It is clear that the Norris Act⁴⁷ simply

43. 2 CCH Lab Cas 359 (Penna 1940).

44. See Pennsylvania Laws of 1939, Act 163, amending the Anti-Injunction Act so as to provide, among other things, that the Act shall be inapplicable to any case involving the breach of a contract arrived at between an employer and the representatives of his employees, designated or selected by the employees as their bargaining representative pursuant to the State or National Labor Relations Acts, unless the complaining person has committed an unfair labor practice in violation of the said Acts or violated any of the terms of the agreement.

[1 Teller]—27

45. See infra, section 422. Federal indictments under the Sherman Act were returned within a short period during the year 1939 against the Teamsters Union, an American Federation of Labor affiliate, as a result of a jurisdictional dispute on a government construction job in Washington, D. C.; against the International President of the Carpenters' Union and other officers in St. Louis, against officers of the Glaziers' Union in Cleveland. New York Times, December 3d, 1939, p. 1.

46. *United States v. Hutcheson*, 32 F Supp 600 (DC ED Mo 1940).

47. 47 Stat 71 (1932), 29 USCA sections 101-115.

withdraws, subject to its terms, the labor injunction from the field of labor relations law, leaving other federal legislation unimpaired.⁴⁸ It cannot be gainsaid, however, that the liberalization of federal labor law evidenced by the Norris Act⁴⁹ and the National Labor Relations Act⁵⁰ has been reflected in holdings more favorable to labor under the Sherman Act.⁵¹ A separate chapter is accorded to the present relationship to each other of the various federal statutes governing labor unions and labor activities.⁵²

Section 134. Picketing in Non-Labor Disputes.

The widespread employment of the picket in connection with labor disputes, and the increasing success of its exercise, have induced its spread to unaccustomed fields. There have consequently arisen within recent years a class of cases involving picketing in protest against matters outside the realm of what is generally understood as constituting labor disputes. Foreign embassies have been picketed by American groups opposed to policies undertaken in the foreign country. Consumer groups have been known to picket in protest against the high cost of living. Tenants too have taken to the picket as a means of complaint against high rents or unsanitary living conditions. Competitors have utilized the picket to enforce rules of competition. Indeed, the daily press is filled with ever extending instances which bear witness to the fact that the picket has become a popular means of redress by one group alleged aggrieved, against the claimed aggriever.⁵³

48. See *infra*, sections 420-422. *C/I United States v Hutcheson*, 32 F Supp 600 (DC ED Mo 1940).

49. 47 Stat 71 (1932), 29 USCA sections 101-115.

50. 49 Stat 449 (1935), 29 USCA sections 151-166.

51. See *infra*, section 422.

52. *Infra*, chapter nineteen, sections 414-423.

53. The variant factual patterns illustrate the ever-spreading employ-

ment of the non-labor picket: (1) Nicaraguan university students are reported to have picketed German stores in protest against a Berlin order to a German citizen residing in Nicaragua, not to marry his non-Aryan fiancée. N. Y. World Telegram, July 8th, 1939; (2) "Declaring that he would not tolerate 'the picketing of God,' Mayor LaGuardia directed Police Commissioner Valentine yesterday to bar the picketing of [1 Teller]

The words "non-labor disputes" are used in this connection to mean any dispute between two people or groups of people whose relationship to each other are not those of employer and employee, the term "labor dispute" being reserved to comprehend a quarrel between employer and employee over the terms and conditions of employment.⁵⁴ It is not meant here to use the term "labor dispute" as that term is employed in the interpretation of the Norris Anti-Injunction Act or prototype state statutes. Nor is it proposed here to draw any distinction between manual labor and employment involving personality factors. Cases which draw such a distinction with the view thereby of denying to the latter class of employees the benefits of labor law⁵⁵ are assumed to be unsound.

places of worship and church rectories of every faith," it appearing "that a place of worship and rectory were threatened to be picketed for the reason that one of the clergymen entertained ideas different from those of an organization active at this time in propaganda." N. Y. Times, October 19th, 1939, p. 1; (3) "Dublin, August 9th, 1939—Fourteen persons deported from England as suspected members of the outlawed Irish Republican Army today picketed the Dublin Horse Show when President Douglas Tyde arrived. Placards carried by the pickets asked 'what are you doing to help Ireland's fight for freedom?'" N. Y. World Telegram, August 9th, 1939; (4) "More than 250 high school students picketed the offices of the R.M.T. at Flatbush Avenue Extension and De Kalb Avenue, Brooklyn, for two hours this morning, as a protest against the transit line's attempt to drive private school busses from the streets." New York World Telegram, January 13th, 1940, p. 1.

54. See *Ulam v. Local 362*, 122 NJ Eq 464, 194 A 263 (1937). The relationship between the parties was that

of joint venture or lease on shares. Picketing was consequently enjoined because the relationship, not being that of employer-employee, was without the ambit of the privileges afforded in labor disputes cases.

55. See *R. A. Freed & Co. Inc. v. Doe*, 154 Misc 644, 278 NYS 68 (1935), where salespeople were enjoined from picketing to induce signature of a closed shop agreement because the "personal equation" of their employment placed them beyond the pale of the benefits accorded labor unions. *Cf. Krip Holding Corporation v. Canavan*, 159 Misc 3, 238 NYS 468 (1936) where the court, refusing to recognize any such distinction, relied upon the State Anti-Injunction Act in holding that skilled musicians were permitted to picket, as against the contention that they were not laborers. See also *Metro-politan Life Ins. Co. v. N. Y. State Labor Relations Board*, 280 NY 194, 20 NE(2d) 390 (1939) where the State Labor Relations Act was held applicable to "white collar workers"; *Wise Shoe Co. v. Lowenthal*, 266 NY 264, 194 NE 749 (1935) where salespeople were permitted to picket

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Court decisions upholding the legality of picketing in non-labor disputes are no longer negligible in number. In *Julie Baking Company v. Graymond*,⁵⁶ an application for an injunction was made to enjoin consumers from picketing in protest against alleged extortionate prices demanded for necessities. The application was denied. In *Bernstein v. Retail Cleaners & Dyers Association*,⁵⁷ the owner of one retail cleaning and dyeing establishment was permitted to picket the premises of another who had reduced his prices in violation of the provisions contained in the Cleaners' Code of Fair Competition. *Barnes Arno Building Corporation v. Hoffman*⁵⁸ is a case where an injunction was refused which sought to restrain tenants from picketing in aid of a rent dispute. Picketing has likewise been permitted by a theatre owner in protest against the practices of a scalper,⁵⁹ and by a food stores association to induce food store owners to adopt a general policy of closing stores earlier on certain days,⁶⁰ or entirely on Sunday.⁶¹

peacefully to secure unionization: *Edelstein v. Gilmore*, 35 F(2d) 723 (CCA 2, 1929) cert. denied, 280 US 607, 50 S Ct 153, 74 L Ed 650 (1930), where theatrical artists were permitted to utilize the weapons of labor activity to secure a closed shop contract.

56. 152 Misc 846, 274 NYS 250 (1934). In *Kitty Kelly Shoe Corporation v. United Retail Employees*, 125 NJ Eq 250, 5 A(2d) 682 (1939) a consumers' league was enjoined from picketing the premises of an employer and advertising the employer's unfairness to union labor where the union had prior thereto been enjoined from similar picketing.

57. 31 Oh NP(NS) 433 (1934). But picketing by a labor union to accomplish the same purpose was held illegal in *Markowitz v. Retail Dry Cleaners Union*, 3 Oh Op 366 (1935).

58. NYLJ March 6th, 1933, p. 1324. *Contra*: 1637 Fulton Ave. Corp. v.

Fox, NYLJ, April 24th, 1933, p. 2445.

59. *Cohen v. Martin Berk*, NYLJ October 23rd, 1934, p. 1407. See also *Robbins v. Altenberg*, NYLJ Nov. 9, 1933 (Sup Ct NY Co P 1690).

60. *Individual Retail Store Owners Association v. Penn Treaty Food Stores Ass'n*, 33 Pa D & C 100 (1938).

61. In re *Lyons*, 27 Cal App 293, 81 P(2d) 190 (1938); *Evans v. Retail Clerks U.* — (Ct Com Pls Fairfield Co 1940). See *Rosman v. United Strictly Kosher Butchers*, 163 Misc 331, 298 NYS 343 (1937) where a Kosher Butchers Association was permitted to inform the public through the medium of the picket that the proprietor was selling kosher poultry and advertising the same, as a means of excluding unwary purchasers into the belief that the meat sold by him was kosher as well. *Contra*: *Bernstein v. United Strictly Kosher Butchers*, NYLJ, Feb 9, 1940, p. 645. In *Birnbaum v. Margoeian*, NYLJ, March

Opposed to the above decisions, however, are a goodly group of respectable authorities. In *People v. Kopazak*,⁶² the New York Court of Appeals affirmed a lower court holding punishing for disorderly conduct, pickets who had protested fire-trap conditions in the building in which they lived. Their remedy, said the court, was to file complaints with the proper municipal department. In *Sea Gate Ass'n v. Sea Gate Tenants Ass'n*,⁶³ the defendants were enjoined from picketing in complaint against what was considered an exorbitant charge for using a private beach, while in *Moneo v. Palmer*,⁶⁴ and *Joseph Victori and Co., Inc. v. Palmer*,⁶⁵ picketing by patriotic Spaniards of a grocery store to coerce the proprietor thereof to cease selling goods originating in rebel Spain was held enjoinable. In *Green v. Samuelson*,⁶⁶ alike with *Beck Shoe Corporation v. Johnson*,⁶⁷ negroes were prohibited from picketing employers who, though obtaining a substantial part of their business from negroes, refused to employ negro help. In the Samuelson case, the court said that the pickets or members of

6th, 1933, p. 1323, the permissibility of picketing was limited to tenants only, an injunction being granted as to any pickets not tenants.

62. 153 Misc 187, 274 NYS 629 (1934), *aff'd*, 266 NY 565, 195 NE 202 (1935). See also negative opinion by the New York City corporation counsel, in answer to a question by the Police Commissioner as to whether rent strikes or picketing therewith is legal. "The right to strike and to peacefully picket in pursuance thereof is confined solely to labor disputes arising between an employer of labor and his employees." Opinion of the Corporation Counsel, New York City, Police Department, City of New York, Circular No. 17, March 1st, 1933. *Weinberg v. Baraky*, NYS Ct Bx Co, 2364-1932 is also in point.

63. 168 Misc 742, 6 NYS(2d) 387 (1938).

64. NYLJ Dec 20th, 1938, per McCook, J.

65. NYLJ January 21st, 1939, per Rosenman, J.

66. 168 Md 421, 178 A 109, 99 ALR 528 (1935).

67. 153 Misc 363, 274 NYS 946 (1934). *Accord Parkshire Ridge Amus, Inc. v. Miller*, NYLJ Oct 23, 1937, p. 1313, *Stevens v. W Phila Youth Civil League*, 34 Pa D & C 612 (1939). *Contra Anora Amus Corp. v. Doe*, 171 Misc 279, 12 NYS(2d) 400 (1939). In *People v. Brisket Buyers Association of Greater New York, Inc* 255 AD 603, 8 NYS(2d) 511 (1938) an association of entrepreneur brisket buyers was restrained because not a labor union, from (1) price fixing, (2) picketing manufacturers and (3) boycotting or intimidating manufacturers to buy only from members of the association.

their race had the right to refuse to patronize the merchants complained of, and to act in concert in so doing. They could go further, the court indicated, and hold public meetings or even solicit both personally or by propaganda, those who were their customers. But the right to picket stood on a different understanding, and with this last proposition the New York Court in the Beck case agreed.

The holdings in the Beck and Samuelson cases have been questioned by the United States Supreme Court in the case of *New Negro Alliance v. Sanitary Grocery Company*,⁶⁸ where it was held that the picketing by an association of colored persons of a retail grocery store for the purpose of inducing the owner thereof to employ negro clerks constituted a "labor dispute" within the purview of the Norris Act, so as to preclude the issuance of an injunction. The court noted that the term "labor dispute" as employed in the Act included, among its several definitions "any controversy concerning terms or conditions of employment . . . regardless of whether or not the disputants stand in the proximate relation of employer and employee." Hence, reasoned the court, race picketing related to conditions of employment might properly be classified as a labor dispute: "The desire for fair and equitable conditions of employment on the part of persons of any race, color or persuasion, and the removal of discriminations against them by reason of their race or religious beliefs is quite as important to those concerned as fairness and equity in terms and conditions of employment can be to trade or craft unions or any form of labor organization or association."

The *New Negro Alliance* case is no authority for the proposition that picketing is as permissible in non-labor disputes as in labor disputes by force of the Norris Act. The case insists, to the contrary, that permissible picketing must have reference to the labor contract and to the terms and conditions of employment thereunder, as a condition to invoking the Act. The novelty of the decision arises

68. 303 US 552, 58 S Ct 702, 82 L Ed 1012 (1938).

from its holding that race, color or creed discrimination justifies the picket, where such discrimination relates to the labor contract. "There is no justification in the apparent purpose or the express terms of the Act," said the court, "for limiting its definition of labor disputes and cases arising therefrom by excluding those which arise with respect to discrimination in terms and conditions of employment based upon difference of race or color."

**Section 135. Picketing and the Right to Free Speech—
Emergence of the Identification.**

A more far reaching import relating to the allowable ambit of picketing than that contained in the New Negro Alliance case is to be found in the case of *Senn v. Tile Layers Protective Union*,⁶⁹ where the highest court of the land indicated that peaceful picketing is an activity which is protected by the constitutional guarantee of free speech.⁷⁰ In the *Senn* case, the court passed upon the constitutionality of the Wisconsin Labor Code, insofar as the same purported to sanction picketing of a tile layer's premises for the purpose of inducing him to sign a union contract, under the terms of which he would be prevented any longer from participating personally in the manual labor of the business. The code was assailed mainly as violative of the 14th amendment to the Federal Constitution, in that it permitted the exercise of labor activity designed to prevent *Senn* from asserting with his own hands the right to work. *Senn's* contention was overruled. "There is nothing in the Federal Constitution,"

69. 301 US 468, 57 S Ct 857, 81 L Ed 1229 (1937).

70. See also *Schuster v. Int'l Assn* 293 Ill App 177, 12 NE(2d) 50 (1938); *Stillwell Theatre, Inc. v. Kaplan*, 259 NY 405, 182 NE 63, 84 ALR 6 (1932), rehearing denied, 260 NY 563, 184 NE 93, 84 ALR 12 (1932), cert. den 298 US 606, 53 S Ct 397, 77 L Ed 981 (1933). Occasional dicta by courts in days past identified picketing with the right of

free speech, but the life of the law proceeded apparently in disregard of such identification. See, for example, *Wood v. Toohey*, 114 Misc 185, 221 NYS 95 (1921) where the court, commenting upon a court holding to the effect that peaceful picketing is legal, said. "This is sound. It is just. It is the law. It must forever remain the law until liberty of speech ceases to be a human right."

said the Court, per Brandeis, J., "which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars or by his window display. . . . Clearly the means which the Statute authorizes—picketing and publicity—are not prohibited by the Fourteenth Amendment. Members of a union might, without special statutory authorization by a state, make known the facts of a labor dispute, *for freedom of speech is guaranteed by the Federal Constitution.*" Thus was the right to picket covered with the protective comfort of constitutional benediction by the same court and by the same judge, moreover, who only a little more than a decade before had categorically answered a similar contention advanced in behalf of the strike with the statement: "Neither the common law nor the fourteenth amendment confers the absolute right to strike."⁷¹ Identification in the Senn case of the right to picket with the constitutional guarantee of free speech was dicta, to be sure. The Senn case decided merely that the Wisconsin Labor Code violated no constitutional right, though construed by the Wisconsin high court to permit picketing of one who operates a business alone without the aid of workers. In fact, the Wisconsin high court in the Senn case⁷² had not identified picketing with the right of free speech. It said rather, that "courts, though differing as to the allowable scope, pretty generally agree that picketing is a legitimate means of *economic coercion*, if it is confined to persuasion and is free of molestation or threat of physical injury or annoyance" (*italics supplied*). But like much of dicta, it

71. *Dorchy v. Kansas*, 272 US 306, 47 S Ct 86, 71 L Ed 248 (1926). See also the closing paragraph of the dissenting opinion of Mr. Justice Brandeis in *Duplex Printing Press Co. v. Deering*, 254 US 443, 448, 41 S Ct 172, 65 L Ed 349, 16 ALR 196 (1921): "Because I have come to the conclusion that both the common law of a state and a statute of the United States declare the right of industrial

combatants to push their struggle to the limits of justification of self-interest, I do not wish to be understood as attaching any constitutional or moral sanction to that right. All rights are derived from the purposes of the society in which they exist; above all right rises duty to the community."

72. 222 Wis 383, 268 NW 270, 273 (1936).

is instinct with mischief. Cases identifying the right to picket with the constitutional right to free speech are rapidly finding their way into the law books.⁷³ In *People v. Ribinovich*,⁷⁴ a conviction for picketing on a public boardwalk without securing a permit from the Department of Parks was reversed on appeal, because the defendants exercised a right to picket with which the Department of Parks could not interfere: "Peaceful picketing is a fundamental human right, as important as the right of free speech and assembly . . . the exercise of that right cannot be made dependent upon the favor of any individual or board."⁷⁵ In recent Colorado and Nevada cases⁷⁶ anti-picketing enactments

73. Closely allied are cases holding that the bannering of pickets are merely the expressions of opinion *Nann v. Raimist*, 255 NY 307, 174 N1 690, 73 ALR 669 (1931), *Stillwell Theatre v. Kaplan*, 259 NY 405, 183 NE 63, 84 ALR 6 (1932), rehearing denied 260 NY 503, 184 NE 93, 84 ALR 12 (1932) cert den 288 US 606, 53 S Ct 397, 77 L Ed 981 (1933) But see *H. B. Rosenthal Fittinger Co. v. Schlossberg*, NYLJ October 18 1933, p 1339, where pickets who bannered an employer as being "unfair to the N.I.R.A." were enjoined because the employer, not having been adjudicated a violator in the manner provided for in the machinery set up by the N.I.R.A., could not be falsely represented as a violator to the public. That the law has not taken the "expression of opinion" theory of picketing very seriously is further evidenced by the readiness (the general rule against the issuance of restraints against libel notwithstanding) with which false statements made by pickets is made the subject of injunctive relief. See *Martineau v. Foley*, 231 Mass 220, 120 NE 445, 1 ALR 1145 (1918); *Wilner v. Bless*, 243 NY 544, 154 NE 598 (1926); *State v. Christie*, 97 Vt 461, 123 A 849, 34 ALR 573 (1924).

74 171 Misc 569, 13 NYS(2d) 135 (1939) See also *Julie Baking Co. v. Graymond*, 152 Misc 846, 274 NYS 250 (1934) where the court, refusing to grant an injunction in restraint of consumer picketing, said the following "The right of an individual or group of individuals to protest in a peaceable manner against injustice or oppression, actual or merely fancied, is one to be cherished and not to be proscribed in any well ordered society. It is an essential prerogative of free men living under democratic institutions"

75. "If the right to peaceful picketing were to be abrogated or limited, a constitutional amendment to that effect would be required" *Rayes, C J*, concurring in *People v. Ribinovich* 171 Misc 569, 13 NYS(2d) 135 (1939).

76. *People v. Harris*, 91 P(2d) 989 (Colo 1939). *City of Reno v. Second Judicial District*, 95 P(2d) 994, 125 ALR 948 (Nev 1939) In the following cases, however, municipal ordinances or statutes in restraint of picketing survived attack as unconstitutional because violative of the guarantee of free speech: *In re Williams*, 158 Cal 550, 111 P 1035 (1910); *Ex parte Stout*, 82 Tex Cr App 183, 198 SW 967 (1917); *Adams*

were declared unconstitutional because impairing the constitutional guarantee of free speech, while in California it has been judicially stated that "in this state the right to peacefully picket rests upon the constitutional guarantee of the right of free speech."⁷⁷

Section 136. Picketing and the Right to Free Speech— Unwisdom of the Identification.

There is reason to pause before according to the picket a *carte blanche* source of authorization which would extend its exercise to all manners of social, religious and political circumstances. The wisdom of any rule purporting to identify the act of picketing with the assertion of the right to free speech is not at all free from doubt. Involved is a dangerous extension of the notion of self-help in the law of torts, without compensating social benefit.⁷⁸ No issue is taken with the New Negro Alliance case, for while it is probably true that the Court went far afield in interpreting the Norris Act to include an aspect of the Negro question within the definition of the term "labor dispute,"⁷⁹ there ought to be no substantial objection to the use of picketing, under such circumstances, where its quarrel

v. Walla Walla 2 LRR 161 (Wash S Ct 1938), Hardie Tynes Mfg. Co v. Cruse, 189 Ala 66, 66 S 657 (1914) (but in Thornhill v. Alabama, 310 US 88, 60 S Ct 736, 84 L Ed 1093 [1940] the statute under which the Hardie Tynes Mfg Co case was decided was held unconstitutional as a deprivation of free speech. See *infra*, section 138); Thomas v. City of Indianapolis, 195 Ind 440, 145 NE 550 (1924) (but the Thomas case has been repudiated by a later case, Local 26 v. Kokomo, 211 Ind 72, 5 NE(2d) 624, 108 ALR 1111 (1937) upon the ground that the ordinance was in conflict with the 1933 State Anti-Injunction Act). See *supra*, section 38, for a more extended discussion of the subject.

77. Ex parte Lyons, 27 Cal App

(2d) 293, 81 P(2d) 190 (1938) In Patterson v. Journeymen Barbers International Union, 5 LRR 20 (Cal 1939) it was stated that legislation purporting to take away the right to engage in peaceful picketing would be unconstitutional as impairing the right to free speech

78. See Wolff, Picketing by Business Competitors (1939), 87 U of Pa L Rev 280. For the view that peaceful picketing is or ought to be identified with the constitutional right to free speech see Feinberg, Picketing, Free Speech and "Labor Disputes" (1940), 17 NYULQ Rev 385; Peterson, The Right to Picket in Light of Anti-Injunction Statutes (1940), 28 Cal L Rev 353.

79. See note, 5 Uni of Chi L Rev 689 (1937).

relates to the terms and conditions of employment. Aggravating circumstances surrounding the Negro's search for work reflect the proximate connection between the Negro's demands and the labor contract. The Negro is too often expressly and more often impliedly excluded from union membership.⁸⁰ Insecure, dispossessed, intensely exploited, the American negro worker clings to the crags of life in the face of overwhelming countervailing forces. Abolition of slavery has not meant emancipation of the negro. *Willis v. Restaurant Employees*⁸¹ further illustrates the point. There a labor union picketed the owner of a restaurant who refused to discharge a non-union colored employee, it appearing, moreover, that the picketing union had theretofore rejected the same Negro's offers to join the union because of the color of his skin. Within the framework of the labor contract, therefore, and as limited by the subject matter of employment conditions, race, color and creed ought to be accorded the privilege of picketing upon the reasonable assumption that its benefit to the in-

80. Spero and Harris, *The Black Worker* (1931), 53 et seq. A more recent study of the problem is Horace R. Clayton and George S. Mitchell, *Black Workers and the New Unions* (1939) where the authors set forth the separatist proposal of an independent Negro trade union members' federation. Such a federation, it is submitted, would project upon the trade union movement another source of dual unionism, internal labor strife, and race antagonism. Propaganda aimed at inclusion of the Negro into the labor unions would seem to be the better course.

The National Labor Relations Board has adopted the rule that race distinctions are not and may not be considered factors in determining whether given employees should or should not be included within the appropriate bargaining unit established for purposes of collective bargaining under the Nation-

al Labor Relations Act. *Union Envelope Company*, 10 NLRB 1147 (1939). *American Tobacco Company*, 9 NLRB 579 (1938); *Interstate Granite Corporation* 11 NLRB 1046 (1939). In the last cited case, the Board thus adverted to the union's request that Negroes be excluded from the bargaining unit otherwise composed of white employees: "The Union contends that only the white employees in the categories listed in the complaint constitute the appropriate bargaining unit. Although the Union does not admit Negroes to membership it has presented no argument that would support their exclusion from the appropriate unit. Furthermore, no evidence is found in the record of any differentiation in function which would constitute a basis for such exclusion. Accordingly, we find that no such limitation upon the unit would be justified."

81. 26 Oh NP(NS) 485 (1927)

dividuals involved is worth more than its cost to society.

Beyond the sphere of the labor controversy, it is submitted that the practice of picketing ought not to extend. The limitation here proposed does not proceed upon the historical circumstance that picketing has become associated with labor disputes, but rather because, rid of its guideposts, picketing bids fair to become a social menace instead of a desirable aid to the achievement of new rights by those economically disadvantaged through existing law. It is undoubtedly true that the destiny of the right to picket is intimately interwoven with democratic institutions. The problem, however, is a further one, involving competing frames of reference in a democratic society. Shall the right to picket claim its source in the idea of free speech or shall it rather be obliged, as a *prima facie* tort, to justify its exercise? Because picketing involves not only the exercise of free speech but something more, it is contended here that the latter frame of reference is the preferable one. The right to strike can at least colorably contend for absolute admission into the realm of the lawful, upon the theory that mere combination may not constitute criminal or tortious, an act which each member of the combination is free to do.⁸² Even the propaganda type of non-coercive primary boycott can plausibly claim the paternity of absolute categories since involving, as in the case of free speech, impact of the idea. Not so the right to picket, which transcends the ordinary publicity mechanism. The marching to and fro before the premises of the person picketed, banner in hand of the marcher, involves the practice of picketing in a distinction which invokes the category of tort. To say, as did the United States Supreme Court in the *Senn* case, that "there is nothing in the Federal Constitution which forbids unions from competing with non-union concerns for customers by means of picketing as freely as one merchant competes with another by means of advertisements in the press, by circulars or by window

82. *Lindsey & Co. v. Montana Federation of Labor*, 37 Mont 264, 96 P 127 (1908). See also Sayre, *Criminal Conspiracy* (1922), 35 Harv L Rev 393. But see *supra*, sections 14-23.

display" is to argue the fallacy of assuming that business competition can be carried on through use of the picket line.⁸³

The nature of the right to free speech and the consequences of applying the free speech rationale in picketing cases need to be considered, in order more properly to evaluate the various aspects of the problem. The right to speak freely is the right to speak from the depths of abysmal ignorance. It is likewise the right to speak with indifferent regard for the truth, and to utter opinions in disfavor with the multitude. Short of speaking in such a manner as to precipitate an immediate panic ("The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.")⁸⁴ or to result in a clear and present danger to the public peace,⁸⁵ or to advocate the violent overthrow of existing organized government,⁸⁶ or to utter words "having the effect of force",⁸⁷ it is the right to use decent words with general abandon.⁸⁸ Finally, it is the right to advocate that which

⁸³ See *Fillet v. Bartolomeo*, 253 AD 815, 1 NYS(2d) 316 (1938), holding picketing by proprietors of a barber shop association to coerce the plaintiff barber shop proprietor to join the association illegal. The court said, "It appears that defendants were picketing plaintiff's shop not to advance the cause of labor, but to injure the plaintiff's business by diverting her trade to themselves. Picketing to achieve such ends is illegal." See, however, *Individual Retail Food Store Owners Ass'n v. Penn Treaty Food Stores Ass'n*, 33 Pa D & C 100 (1938) where the court, after stating that such picketing was permissible remarked, "We are in the initial stages of a new type of economic rivalry."

⁸⁴ *Schenk v. United States*, 249 US 47, 39 S Ct 247, 63 L Ed 470 (1919).

⁸⁵ *Schenk v. United States*, 249 US 47, 39 S Ct 247, 63 L Ed 470

(1919).

⁸⁶ *Gitlow v. New York*, 268 US 652, 45 S Ct 625, 69 L Ed 1138 (1923).

⁸⁷ *Gompers v. Buck's Stove & Range Co.*, 221 US 418, 31 S Ct 492, 55 L Ed 797, 34 LRA(NS) 874 (1911).

⁸⁸ See *Stromberg v. California*, 283 US 359, 51 S Ct 532, 75 L Ed 1117 (1931), *Near v. Minnesota*, 283 US 697, 51 S Ct 625, 75 L Ed 1357 (1931), *Hague v. C. I. O.*, 307 US 496, 59 S Ct 954, 83 L Ed 1423 (1939), *Schneider v. State*, 308 US 147, 60 S Ct 146, 84 L Ed 155 (1939), *Cantwell v. Connecticut*, 310 US 296, 60 S Ct 900, 84 L Ed 1213 (1940).

To say, as did the court in *Pando v. Bartenders' International Alliance*, 2 CCH Lab Cas 359 (Penna 1940), that notwithstanding the identification of picketing with the right to free speech, the right to picket is

positive law proscribes. And it is here that the right to free speech departs significantly from other forms of human activity, from other extrajudicial self-help remedies. It is not improper to advocate the social desirability of monopoly, or combinations in restraint of trade and commerce. But it is quite another thing and clearly illegal to combine in restraint of trade, or tortiously to coerce a monopoly. The long years of struggle for democracy are largely a record of the argument for the untrammelled right to free speech. It is inconsistent with that right for the executive or legislature to censor peaceful utterances. And no democracy can claim a healthy existence which must point to a judiciary empowered to test the social desirability of given publications. The judiciary has thus far remained relatively blameless in this respect. Equity, it is proudly asserted, does not act as a censor of publications.⁸⁹ The libel laws are generally said to be sufficient a deterrent to the scandalmonger and the conveyer of insults.⁹⁰

With the emergence of picketing, a new problem has been presented to the judge and to the student of jurisprudence. The judiciary has thus far definitely established the principle that picketing is legal to the extent only that its purpose is not socially hurtful. In developing this principle, the judiciary has never purported to test the right to free speech in the light of social desirability. It has, to the contrary, many times disclaimed such a purpose. The present general position of the judiciary seems to be that picketing involves the doing of an act and the commission of a tort which, to be legal, must justify itself.⁹¹ Identification of

still qualified to the extent that to be legal, it must be for a lawful purpose ("The latest deliverance of Justice Brandeis, to the effect that picketing is a constitutional right on a par with the other privileges enumerated in the Bill of Rights, connotes the exercise of all these constitutional privileges in a lawful manner") is to confuse absolute with qualified privileges, and to impair the meaning of what freedom of speech stands for

in the light of centuries of contention on behalf of that freedom. See also *Roth v. Local Union*, 24 NE(2d) 280 (Ind 1939).

⁸⁹. See section 128, *supra*.

⁹⁰. Pound, *Equitable Relief against Defamation and Injuries to Personality* (1916), 29 Harv L Rev 640, 648.

⁹¹. Holmes, *Privilege, Malice and Intent* (1894), 8 Harv L Rev 1; Wigmore, *Justice Holmes and the Law of Torts* (1916), 29 Harv L Rev 614.

the picket with the exercise of the right to free speech is distinctly a very recent development subscribed to sporadically and by but a few courts. Having in mind the generally absolute character of the right to free speech essential to the existence and maintenance of democracy, it is submitted that the consequences of such an identification argues against it.

Some of those consequences are not difficult to point out even at the present time and under the conditions of our present relatively undeveloped state of picketing law. Picketing in jurisdictional disputes would be held proper, though the employer had theretofore settled a labor dispute pursuant to the National Labor Relations Act, or a prototype state statute.⁸² Likewise held unobjectionable would be secondary picketing⁸³ or the picketing of a residence of an employer or employee involved in a labor dispute,⁸⁴ as would also picketing to secure a closed shop by a labor union whose ranks are virtually closed to competent non-union workers, though the closed shop contract were to

"The act of striking or picketing necessarily involves compulsion and coercion and unless the same is performed by acts of fraud or violence, is lawful and permissible under the statute." *Local 26 v Kokomo*, 211 Ind 72, 81, 5 NE(2d) 624, 108 ALR 1111 (1937). See also the discussion, *supra*, sections 113, 114, on the legality of picketing in furtherance of an unlawful purpose or an unlawful strike. *C/f Local Union v. Stathakis* 135 Ark 86, 205 SW 450 (1918) where the court said: "While the tendency of the earlier cases was to uphold picketing as an exercise of the right of free speech, the tendency of later cases is to restrict that right as an act of coercion in its tendencies and one which in its practical applications tends generally to breaches of the peace and other disorders." The "rightful aspect" of labor activity in general is discussed *supra*, at sections 57-77.

⁸² See *supra*, section 132.

⁸³ See *supra*, section 123. In *Ellingsen v Milk Wagon Drivers' Union*, — NF(2d) — (Illinois 1940), the union contended for a right to engage in secondary picketing in spite of the prior settled Illinois law to the contrary (see section 123, *infra*) because of the identification of picketing with the right to free speech, but the court held against the union, saying "While the right of free speech is a vital right and is to be protected, yet there are other rights under the constitution, such as the right to acquire property and to have its use protected; and where the privilege of free speech is employed to the exclusion of the recognition of constitutional rights of others, the constitutional guaranty of free speech cannot be used as a background or protection for an attempt thus to injure others."

⁸⁴ See *supra*, section 115.

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control substantially the entire industry.⁹⁵ So also would picketing to induce a small business to persuade it to employ some or more employees,⁹⁶ or by competitors to enforce rules of competition,⁹⁷ or in the absence of a strike,⁹⁸ or in violation of a collective bargaining agreement.⁹⁹

It need not here be argued whether any of the foregoing activities are socially desirable nor whether their consequence should be legality or illegality. The chaos of present day American labor law is reflective of the difficulty of the various problems involved and the valiant effort being made by the judiciary to resolve the competing claims with a content of fairness.

In general, identification of the right to picket with the constitutional exercise of the right to free speech involves removal of the right to picket from the judiciary to utilize or the legislature to test in the light of changing social con-

95. See *Wilson v Newspapers Union*, 123 NJ Eq 347, 197 A 720 (1938) where a closed shop contract was held contrary to public policy where the union involved is closed to competent non-union workers. The general problem is discussed *supra*, at section 99.

96. See *supra*, section 121.

97. See *supra*, section 134.

98. See *supra*, sections 117-121.

99. Picketing as well as strikes and boycotts in violation of agreement are everywhere held illegal. See *supra* section 86, and *infra*, sections 163, 177. See also *Greater City Master Plumbers Assn v. Kahme*, 6 NYS(2d) 589 (1937); *F. Everett, Inc v. Penna*, 168 Misc 589, 6 NYS(2d) 630 (1938); *T. I. Hass Co v. McNamara*, 21 NYS(2d) 441 (1940); *Grassi Construction Co v. Bennett*, 174 AD 244, 160 NYS 269 (1916); *Uneeda Credit Clothing Stores, Inc v. Briskin*, 14 NYS(2d) 964 (1939); *The Nevins, Inc. v. Kasmach*, 279 NY 323, 18 NE(2d) 294 (1938); *Euclid Candy Co. v. Summa*, 174 Misc 432

19, 19 NYS(2d) 382 (1940). Cf *The Lundoff Becknell Co v. Smith*, 24 Ohio App 294, 156 NE 243 (1927). (As to whether such labor activity constitutes a "labor dispute" under anti-injunction laws, see *infra*, section 177).

Indeed, the argument was made in *Shop 'N Save v. Retail Food Clerks Union*, 2 CCH Lab Cas 747 (Cal 1940), where picketing was carried on in breach of a collective bargaining agreement, that an injunction against picketing under such circumstances could not be issued because of the identification of picketing with the right to free speech. But the court dismissed the argument as untenable, with the statement that picketing by a group confederating to do a wrong is not equivalent to the exercise of free speech, but is rather the use of free speech as a means of utilizing unlawful force within the notion of the *Gompers* case (*Gompers v. Buck's Stove & Range Company*, 221 US 418, 31 S Ct 492, 55 L Ed 797, 34 LRA(NS) 874 [1910]).

ditions. The abortive nature of such an identification is illustrated by the destiny of the rule announced in the *Senn* case. No sooner was the ink of the United States Supreme Court decision in that case dry when the state of Wisconsin, by amendment to its Labor Relations Act, so redefined a labor dispute as most likely to render illegal the picketing of premises where no employees are employed.¹ Will it be contended that the Wisconsin law is unconstitutional as constituting an interference with the right to free speech? If so, Wisconsin will bear the heavy burden of showing that a clear and present danger to the public justifies exercise of the police power of the state to qualify a right ordinarily flowing from the constitutional guarantee of free speech. In *Wisconsin Emp. Relat. Bd. v. Allen Bradley Local*,² the ban on mass picketing contained in section 111.06 (2f) of the amended State Labor Relations Act was held constitutional as against the contention, among others, that the act violated the constitutional guarantee of free speech, the court indicating that the assailed section "is not intended to declare all mass picketing unlawful," but it is expressly limited in its application to cases tending "to hinder or prevent . . . the pursuit of any work or employment." In *Hotel & Restaurant Employees' International Alliance v. Wisconsin Emp. Relat. Bd.*³ the ban on violent picketing likewise contained in 111.06 (2f) was contested as a deprivation of the right to free speech insofar as it was utilized against the right to picket, but the court brushed the argument aside, with the statement that "Peaceful picketing or patrolling, whenever accorded legal sanction . . . has invariably

1. "The term 'labor dispute' means any controversy between an employer and the majority of his employees in a collective bargaining unit concerning the right or process or details of collective bargaining or the designation of representatives" (1937 Wisconsin Stats., section 103.62 as Am L 1939, c 25). Similar statutes have been adopted by the states of Oregon (c. 25, L 1939) and Pennsylvania (Purdon's Ann Stats, Title

43 "Labor," and L 1939, c 57) An ordinance to like effect passed by the City of Los Angeles, California (See, for a discussion of the ordinance, note. 38 Col L Rev 1521-1528, 1938) was declared void *People v. Gidaly*, 93 P(2d) 660 (Cal 1939)

2. ——— Circuit Ct Milwaukee Cty, December 14th, 1939.

3. ——— Circuit Ct. Milwaukee Cty, May 11th, 1940.

been conditioned upon the absence of intimidation or coercion, or any method involving fraud, violence, breach of the peace, threat thereof, or interference with the free use of streets and entrances."

Further evidences of the undesirability of identifying the right to picket with the constitutional exercise of free speech is found in the manner in which that identification has worked out in recent cases. In *Meadowmoor Dairies Inc. v. Milk Wagon Drivers Union*⁴ the plaintiff dairy company sought to enjoin the defendants from picketing stores where its milk was sold or offered for sale. It appeared that the plaintiff's competitors delivered milk in their own trucks to retail stores and employed drivers for that purpose who were members of the defendant union. The plaintiff, however, sold its milk directly to individuals who owned or operated their own trucks, and who, in turn, resold the milk to proprietors of retail stores. The union contended this was unfair to union drivers who lost their employment through the plaintiff's business methods. The plaintiff's application for an injunction was granted, the court holding that picketing for such a purpose was unlawful. The pickets had contended that they could not be "restrained or enjoined in any case from carrying placards bearing thereon printed words conveying information to the public, because such would violate the guarantee of free speech," to which the court replied: "The right to acquire and protect property is an inherent right not given but declared by the constitution. The privilege of free speech cannot be used to the exclusion of other constitutional rights nor as an excuse for unlawful activities." Here is a *ratio decidendi* whose subtlety has heretofore escaped the most speculative of natural law theorists. There seem, according to the court, to be two distinct kinds of constitutional guarantees, of which the right to free speech is but a constitutional *privilege*, while the right to acquire and protect property is a constitutional *right* "not given" but merely "declared" by the constitution.

⁴ 371 Ill 377, 21 NE(2d) 308 (1939).

A similar rationale is to be found in *Mitnick v. Furniture Workers Union*,⁵ where the defendants, seeking to unionize the complainant-manufacturer, were restrained from distributing circulars in the vicinity of the manufacturer's customers, advertising the existence of the controversy, in spite of the contention of the defendants that they had a right to do what they did because of the state and federal constitutional guarantees of free speech. Said the court: "There are two classes of constitutional rights: (1) absolute rights; and (2) qualified rights, which latter are more in the nature of privileges." The court proceeded to identify the right to acquire property with the quality of an "absolute right" as contrasted with the "qualified right" to free speech. The court then concluded: "The complainant and his customers are in the lawful exercise of their inherent or absolute rights; the defendants cannot be permitted to exercise their qualified rights, or privileges, in such manner as will be destructive of the absolute rights of complainant and his customers."⁶

Such are samples of the judicial decisions of tomorrow, seeking through obscurity and legerdemain to reinstate in terms of flux and social policy, that which the dicta of the Supreme Court in the *Senn* case have covered with the higher law guarantee of free speech.⁷

5. 124 NJ Eq 147, 200 A 553 (1938), appeal dismissed. 125 NJ Eq 142, 4 A(2d) 277 (1939), upon the ground that the parties had in the interim effected an adjustment of the controversy.

6. See also *Crosby v. Rath*, 136 Oh St 332 (1940), and *Ellingsen v. Milk Wagon Drivers' Union*, — NE(2d) — (1940), and consider in this connection *American Federation of Labor v. Buck's Stove & Range Co*, 33 App DC 83, 32 LRA(NS) 748 (1909) *In Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*, 2 CCH Lab Cas 730 (Circuit Ct Milwaukee City, May 11th, 1940), the defendants

resisted a ban upon all picketing entered because of violence in its past exercise the ground of resistance being that peaceful picketing could not be enjoined because such picketing was simply the exercise of the right to free speech. Nevertheless the court held that the blanket injunction may still be employed notwithstanding the identification of the right to picket with the right to freedom of speech.

7. In *Roraback v. Moving Picture Operators Union*, 140 Minn 481, 168 NW 766 (1918), picketing seeking to coerce a single entrepreneur employing nobody, to employ members of the defendant union was enjoined.

Another method of dealing with the identification of picketing with free speech will undoubtedly be to state the identification and then to disregard its implications when embarrassment is the consequence. An instance in point is *Roth v. Local Union*,⁸ where the court identified the right to picket with the constitutional right to free speech, yet held unlawful peaceful picketing for the closed shop, or in the absence of a strike.

The argument has been advanced that picketing must be considered within the framework of the notion of free speech or persuasion, in preference to the idea of an instrument of economic warfare, because the latter involves a conception at variance with the foundations of sovereignty. That one group should have the right in an organized society to wage war against and inflict harm upon another group is said to be a circumstance at variance with law and order, which conflicts with the basic conceptions of civilized, organized society. It is better to say that picketing is merely a form of persuasion since sovereignty and individual rights are thereby reconciled. That there is force to the argument cannot be denied. But it will be seen upon reflection to be basically without merit. It constitutes a sacrifice offered up to the sovereign which, like the Trojan horse, is a gift-bearing token to be feared. In the first place, the argument results in an anomaly. Whatever the

The court referred to the plaintiff's right to operate his own business without assistance as a "constitutional right." So too in a more recent case, *Lyle v. Amalgamated Meat Cutters*, 125 SW(2d) 701 (Tenn 1939) it was held that where the owner is the sole person required to run the business, picketing by a labor union will be enjoined as depriving the owner of his liberty and property as guaranteed by due process provisions of state and federal constitutions. Unless the reasoning of the court in the *Meadowmoor* case (*supra*, this section, note 4) be adopted, it would

seem that the first case should be differently decided today, and that the second case was wrongly decided, in view of the *Senn* case. Cf. Shulman, *The Supreme Court's Attitude Toward Liberty of Contract and Freedom of Speech*, 41 Yale L.J. 262 (1931), where the writer points to cases in support of his thesis that the United States Supreme Court has been more careful to protect property rights than to preserve inviolate personal liberty rights including the right to free speech.

8. 24 NE(2d) 280 (Ind 1939).

label attached to the new view of picketing, whether free speech or persuasion, the right to picket is thereby, as has been seen, immeasurably widened. The "economic warfare" theory, upon the other hand, is one which permits but a narrow definition of legal picketing. Sovereignty is thus said to be placated by giving one group of individuals greater, not less, rights of inflicting harm upon another group. In the second place, the argument disregards the fact that the infliction of intentional harm has, in so many non-labor situations, been permitted by the law through operation of the theory of just cause and excuse for many decades. It has never been contended that the idea of justification and excuse is a judicially evolved but anti-sovereign precept. Thirdly, the argument suffers from the assumption that law making by private groups is inconsistent with the idea of sovereignty. With a dictatorship or other form of autocratic or elite pattern of government, it is no doubt irreconcilable. But pluralism is instinct in democracy, and has been an important theoretical basis of labor unions and labor activities, whether expressly avowed or furtively implied, since the inception of the labor movement.^{8a}

Finally, an outstanding consequence of unlimited picketing in non-labor disputes would be the aggravation of troublesome race hostility. We take the separation of Church and State in America as an obvious tradition. The history of that separation, however, which found its American culmination in state and federal constitutional guarantees, is inseparably associated with freedom of religion. The realms of selfhood are difficult of capture. We have, whether in wisdom or despair, concluded the centuries of religious controversy with the hope that contending religions will settle upon mutual esteem and respective contributions as the safest guide to communal living. We have long ago reached such conclusions in the fields of art, literature and music. The merit of anarchy in the spheres of the emotions is superior to the possible advantages of organization. A statute designed to disqualify or otherwise

8a. See *supra*, section 77.

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to subject to disability because of religious circumstances would be unthinkable in the United States today. The very discussion of such a statute would be interpreted as an attack upon a fundamental postulate of democracy. A judicial principle which would permit picketing in race disputes cases should similarly be interpreted.

Section 137. Picketing and the Right to Free Speech— View of the Restatement.

While the Restatement accords to peaceful picketing a wide area of permissibility,⁹ it seems clear that picketing is not identified with the idea of free speech. The legality of picketing under the Restatement depends upon the particular object sought to be attained,¹⁰ and picketing, though peaceful, is illegal under several other circumstances, as, for examples, where a union, engaged in a dispute with a wholesaler selling goods A, pickets a retailer with banners seeking to persuade the public to refrain from purchasing from the retailer not only goods A but all other goods sold by the retailer,¹¹ or where the retailer, though promising not to purchase goods from the wholesaler, is picketed because he insists upon selling such of the wholesaler's goods as the retailer had on his shelf at the time he was informed of the dispute¹² or where the wholesaler's supplier's source of supply (the "supplier" being a manufacturer and the "source of supply" being a processor of raw goods necessary in the manufacture of the merchandise) is picketed by pickets who insist that the processor refrain from selling to the manufacturer not only such raw goods as are destined for the wholesaler, but also such raw goods as are destined for the manufacturer's other customers.¹³

In general the Restatement recognizes five forms of economic pressure: the strike,¹⁴ refusal to work on non-union

9. See Rest., Torts (1930), secs. 779, 781, 783, 798-801.

10. Rest., Torts (1939), sec. 779 (b). An enumeration of the permissible and non-permissible objects is set forth in secs. 794-796.

11. Rest., Torts (1939), sec. 799 (b).

12. Rest., Torts (1939), sec. 801, Illustration 2.

13. Rest., Torts (1939), sec. 801 (c).

14. Rest., Torts (1939), Topic 8 (Scope-Note); secs. 797, 802-806.

goods;" discipline by a union of its members;¹⁶ "fair persuasion"¹⁷ and withdrawal of patronage.¹⁸ "The words 'fair persuasion' include picketing." Dissatisfaction with the word "boycott" is evident from the fact that the word is not used, the term "fair persuasion" apparently being considered inclusive also of the notion of boycotting.

**Section 138. Picketing and the Right to Free Speech—
Thornhill v. Alabama.¹⁹**

In this case the petitioner had been convicted under the assailed statute, for peaceful picketing with truthful banners, in connection with a strike. The statute read as follows:

"Section 3448. Loitering or picketing forbidden.—Any person or persons who, without a just cause or legal excuse therefor, go near to or loiter about the premises or place of business of any other person, firm, corporation, or association of people, engaged in a lawful business, for the purpose, or with the intent of influencing, or inducing other persons not to trade with, buy from, sell to, have business dealings with, or be employed by such persons, firm, corporations, or association, or who picket the works or place of business of such other persons, firms, corporations or associations of persons for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another, shall be guilty of a misdemeanor; but nothing herein shall prevent any person from soliciting trade or business for a competitive business."

The court held the statute unconstitutional because its vice appeared upon its face. In pointing out the broad sweep of the language of the statute, the court stated: "The numerous forms of conduct proscribed by section 3448 are subsumed under two offenses: The first embrace the activities of all who 'without just cause or excuse' 'go near or loiter about the premises' of any person engaged in a

15. Rest., Torts (1939), sec. 802

16. Rest., Torts (1939), sec. 798.

17. Rest., Torts (1939), secs. 779.
798, 799.

18. Rest., Torts (1939), secs 807,
808

19. 310 US 88, 60 S Ct 736, 84 L
Ed 1093 (1940).

lawful business for the purpose of influencing or inducing others to adopt any of certain enumerated courses of action; the second, all who 'picket' the place of business of any such person, for the purpose of hindering, delaying or interfering with or injuring any lawful business or enterprise of another."

About the first class of offenses under the statute the court had little to say other than to declare it a patent prohibition of free speech because comprehending courses of action "which in many instances would normally result from merely publicizing, without annoyance or threat of any kind, the facts of a labor dispute." The second class of offenses were surrounded by "vague contours," said the court, because the word "picket" was nowhere defined. Hence "employees or others, accordingly, may be found to be within the purview of the term and convicted for engaging in activities identical with those proscribed by the first offense."

Having thus revealed the statute as a dragnet designed to interfere in many instances with the exercise of free speech, the court disposed of the state's contentions that the statute could be saved because (1) its application was limited or restricted to such activity as takes place at the scene of the labor dispute, and (2) it was designed to protect the community from asserted concomitants of picketing, to wit, violence and breaches of the peace. The court, however, found neither contention persuasive, the first because there was no basis for the limitation or restriction, the second because "The danger of breach of the peace or serious invasion of rights of property or privacy at the scene of a labor dispute is not sufficiently imminent in all cases to warrant the legislature in determining that such place is not appropriate for the range of activities outlawed by section 3448."

Thornhill v. Alabama is thus seen to be simply the case of a badly drawn statute whose imperfect draftsmanship was a menace to free speech. Recognition of the state's power to regulate the right to picket is implied in the court's

statement to the effect that "It is true that the rights of employers and employees to conduct their economic affairs and to compete with others for a share in the products of industry are subject to modification or qualification in the interests of the society in which they exist."

**Section 139. Picketing and the Right to Free Speech—
Carlson v. California.²⁰**

The appellant in this case was one of a group of 29 men engaged in picketing on a public highway in connection with a labor dispute. He was convicted under and challenged the constitutionality of, a county ordinance similar, in scope and lack of precision, to the statute involved in *Thornhill v. Alabama*. The ordinance was held unconstitutional as an abridgment of free speech. *Thornhill v. Alabama*, said the court, "goes far toward settling the issues here." The court pointed out that the words "loiter" and "picket" used in the ordinance were not defined therein or in any authoritative state decisions. Hence these words "must be judged as covering all the activities embraced by the prohibition against the carrying of signs in the vicinity of a labor dispute. . . ." Carrying like signs in connection with courses of action not involving labor disputes was not proscribed by the ordinance. The ordinance was held unconstitutional because its "sweeping and inexact terms" disclosed "the threat to freedom of speech inherent in its existence." Then the court added the following language which will probably be quoted in many quarters without reference to the connection in which it was used, and hence misquoted: "The carrying of signs and banners, no less than the raising of a flag, is a natural and appropriate means of conveying information on matters of public concern. *Stromberg v. California*, 283 US 359. For the reasons set forth in our opinion in *Thornhill v. Alabama*, supra, publicizing the facts of a labor dispute, in a peaceful way through appropriate means, whether by pamphlet, by word of mouth or by banner, must now be regarded as within

²⁰ 310 US 106, 60 S Ct 746, 84 L Ed 1104 (1940).

that liberty of communication which is secured to every person by the Fourteenth Amendment against abridgment by a state." The court was quick to add that "The power and duty of the state to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted."

**Section 140. Picketing and the Right to Free Speech—
Present Uncertainty of the Nature and Extent of the
Identification.**

The story which comprehends the nature and consequently the extent of legal protection afforded picketing is one which, like a serial, will be told in future instalments. It cannot be stated with certainty today that picketing is an instrument primarily in the nature of economic warfare nor can it be said that it is equivalent to the exercise of free speech. To the extent that its consequences will the better be understood, picketing will become a weapon or method more clarified in nature. The Supreme Court's use of the word picketing in quotations both in the Thornhill case and the Carlson case, and its viewpoint that picketing may mean one of many things, is a large ingredient of the current uncertainty regarding picketing. The care with which the United States Supreme Court in both the Thornhill and Carlson cases emphasized the right of the state to regulate the means of exerting economic pressure is an indication of the numerous problems which future legislation will raise. In *Hotel & Restaurant Employees' International Alliance v. Wisconsin Employment Relations Board*,²¹ a blanket injunction was issued against all picketing, because of the violent manner of the defendants' exercise thereof in the past. The defendants insisted they had a right to picket peacefully in view of the fact that picketing was simply the exercise of the right to free speech. The court overruled the defendants' attacks on the injunction. *Thornhill v. Alabama* and *Carlson v. California* were men-

²¹ 2 CCH Lab Cas 730 (Circuit Ct Milwaukee City, May 11th, 1940).

tioned by the court, and distinguished upon the ground that the picketing in those cases was peaceful. The court emphasized the express recognition contained in the decisions of the High Court to the effect that the state has the power, by reasonable and appropriate enactment, to regulate the right to picket.

CHAPTER NINE

THE BOYCOTT

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Section 141. The Boycott Defined.

The "boycott" is a word of the widest import, and the books are filled with its definition. Wolman's definition of the term, because it is the most inclusive, seems to be the one least objectionable: A boycott "is a combination formed for the purpose of restricting the markets of an individual or group of individuals."¹ The term is said to have originated in Ireland in 1880, out of the name of one "Captain Boycott," a landlord's agent ostracized by the Irish Land League for his rigor in collecting rents in the face of widespread famine.² The Connecticut case of *State v. Glidden*³ appears to be the first case wherein the word "boycott" was employed.⁴ In Bouvier's Law Dictionary,

1. Wolman, *The Boycott in American Trade Unionism* (1916), pp. 10-13.

2. c/f Martin, *Modern Law of Labor Unions* (1910), p. 101. "It has been suggested that the boycott had its inspiration in the proceedings of excommunication practiced in ecclesiastical tribunals," citing 19 Ir.

L Times, p. 572, which in turn is cited in *Barr v. Essex Trades Council*, 53 N1 Eq 101, 30 A 881 (1894).

3. 55 Conn 46, 8 A 890, 3 Am St Rep 23 (1886).

4. *Consolidated Steel & Wire Co. v. Murray*, 80 F 811, 819 (CC ND Ohio ED 1897).

the boycott is defined in terms of "a confederation, generally secret",⁵ but precisely the opposite is generally the case, for the boycott meets with miscarriage or success to the extent that it is secret or well-advertised. "Whispering campaigns," whether in the field of political controversy, or in the domains of social and religious antagonisms, are no doubt outstanding illustrations of "secret federations," but in the great generality of cases, the open and well-advertised combination is the only method by which the boycott may signify its purpose with any measure of success.

Some definitions of the boycott stress the notion of a group A. boycotting to induce a group B. to cease relationship with C. or a group C.⁶ Such definitions are subject to criticism as attempting to explain an activity in terms of one of its aspects only, even though admittedly an outstanding one. It is just as much a boycott for employees A., B. and C. to utilize the strike as a method of coercing X., or to utilize a concerted refusal to deal, as it is for the same employees to persuade or by pressure to coerce D. into compliance with their demand that D. cease to patronize X.

Aside from these words of caution, there is little to be said of the numerous definitions of the term "boycott," other than to note that while the words chosen by the various commentators upon the term differ, the substance of all definitions is a common denominator.⁷

5 See also *Green v. Samuelson*, 168 Md 421, 178 A 109, 99 ALR 528 (1935).

6. See Martin, *Modern Law of Labor Unions* (1910) p 110, *Meier v. Speer*, 96 Ark 618, 132 SW 988 (1910); *American Federation of Labor v. Buck's Stove & Range Co.* 33 App DC 83, 32 LRA(NS) 748 (1909), appeal dismissed, 219 US 581, 31 S Ct 572, 55 L Ed 345 (1910).

7. See, for definitions of the term "boycott," the following: *American Federation of Labor v. Buck's Stove & Range Co.* 33 App DC 83, 32 LRA(NS) 748 (1909), appeal dismissed, 219 US 581, 31 S Ct 472, 55

L Ed 345 (1910); *Toledo, etc R Co v. Pennsylvania Co* 54 F 730, 19 LRA 387 (CC ND Ohio 1893); *Oxley Stave Co v. Coopers' International Union* 72 F 695 (CCD Kans 1898); *Truax v. Bisbee*, 19 Ariz 379, 171 P 121 (1918); *Meier v. Speer*, 96 Ark 618, 132 SW 988, 32 LRA(NS) (1910), *State v. Glidden*, 55 Conn 46, 8 A 590, 3 Am St Rep 23 (1887); *Paramount Enterprises v. Mitchell*, 104 Fla 407, 140 S 328 (1932); *Green v. Samuelson*, 168 Md 421, 178 A 109, 99 ALR 528 (1935); *Gray v. Building Trades Council*, 91 Minn 171, 97 NW 663, 63 LRA 753, 103 Am St Rep 477 (1903); *Steffes v.*

Section 142. General Nature of the Wrong and the Right Involved in the Boycott.

Considerable discussion has heretofore been given to the right to a free and open market, and the extent of common law recognition of that right. Infringement of that right is the wrong by virtue of which the boycott collides with the criminal and civil sanctions of the law.⁸ Sometimes, the sanctions applied find their source in a statute, as, for example, the Anti-Trust laws,⁹ of the Interstate Commerce Acts.¹⁰ Whether statute or rule of the common law is involved, however, the rationale of the decision is the same. Restriction of the market or of the free flow of merchandise

M.P.M.O.U. 136 Minn 200, 161 NW 524 (1917); *Baldwin v. Escanaba Liquor Dealers' Assn* 165 Mich 98, 130 NW 214 (1911); *Mills v. United States Printing Co.* 99 AD 605, 91 NYS 185 (1904); *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont 264, 96 P 127, 18 LRA(NS) 707, 127 Am St Rep 722 (1908); *Clarkson v. Laiblan*, 178 Mo App 708, 161 SW 660 (1913); *State v. Van Pelt*, 136 NC 633, 49 SE 177, 68 LRA 760, 1 Ann Cas 495 (1904); *Moore v. Bricklayers' Union*, 10 Ohio Dec Reprint 665 (1889); *Brace Bros. v. Evans*, 5 Pa Co Ct 163 (1888); *Hailey v. Brooks*, 191 SW 781 (Tex Civ App 1916); *Dick v. Northern P. R. Co.* 86 Wash 211, 150 P 8, Ann Cas 1917A, 638 (1915); *United Union v. Dave Beck*, 100 Wash Dec 412, 93 P(2d) 772 (1939).

8. See sections 11-23, *supra*, for a discussion of the right to a free and open market. The sanctions referred to are discussed at sections 27-56, *supra*.

9. See *Loewe v. Lawlor*, 208 US 274, 28 S Ct 301, 52 L Ed 488, 13 Ann Cas 815 (1908); *Gompers v. Buck's Stove & Range Co.* 221 US 418, 31 S Ct 492, 55 L Ed 797, 34 LRA(NS) 874 (1911); *Eastern States* 446

Lumber Assn. v. United States, 234 US 600, 34 S Ct 951, 58 L Ed 1490, LRA1915A, 788 (1914); *Lawlor v. Loewe*, 235 US 522, 35 S Ct 170, 59 L Ed 241 (1914); *Duplex Printing Press Co v. Deering*, 234 US 443, 41 S Ct 172, 65 L Ed 349, 16 ALR 196 (1921); *American Steel Foundries v. Tri-City Central Trades Council*, 257 US 184, 42 S Ct 72, 66 L Ed 189, 27 ALR 360 (1921), *Bedford Cut Stone Co. v. Journeymen Stone Cutters' Ass'n*, 274 US 37, 47 S Ct 522, 71 L Ed 916, 54 ALR 791 (1927). See also sections 187-192, 422, *infra*, for a more extensive analysis of the anti-trust laws.

10. See *In re Debs*, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895); *United States v. Workingmen's Amalgamated Council*, 54 F 994, 26 LRA 158, 4 Inters Com Rep 831 (CC ED La 1893), *aff'd*, 57 F 85, 6 CCA 258, 11 US App 426 (CCA 5, 1893); *Toledo, etc. R. Co. v. Pennsylvania Co.* 64 F 746, 19 LRA 387, 4 Inters Com Rep 522 (CC Ohio 1893); *Knudson v. Benn*, 123 F 636 (CCD Minn 1903); *Wabash R. Co. v. Hannahan*, 121 F 563 (CCD Mo 1903); *United States v. Casady*, 67 F 698 (DC Cal 1895).

limited only by the demands and supplies of the market, are the grounds of decision.

We have heretofore likewise examined in detail the rightful aspect of labor organizations and labor activities. Repetition of the factors which have gone into decisions holding legal the various characteristics of the labor movement is unnecessary at this point.¹¹

Section 143. Allocation of Subjects.

Discussion of the law of boycotts bulked large in the earlier books on labor law, because there were included under the subject of boycotts activities of both labor and capital which now call for allocation in the light of the evolution of the subject, and in the face of clearer understanding of the different issues raised by the various forms of labor activity.

Strikes, picketing and the union label are the labor activities which have been lifted from the general subject of boycotting for separate treatment, while blacklisting and the lockout are the two important weapons employed by capital which have likewise been made the subject of separate analysis.

Strikes, being but one of the methods of economic pressure involving interference with the employer's right to a free and open market, come within the broad definition of the boycott, but strikes have always been treated separately because they were such early weapons employed by labor, and because injunctions against strikes were thought to collide with (1) the constitutional ban against involuntary servitude, and (2) the historically understood limitation upon equity's jurisdiction to enforce specifically contracts of personal service. Not so, however, in the case of the secondary strike. Almost uniformly, such a strike has been considered to be simply one form of secondary boycott.¹² In

11. The rightful aspect of labor organizations and labor activities is considered at sections 57-77, *supra*.
12. See Frankfurter and Greene, *The Labor Injunction* (New York, 1930), p. 43; Oakes, *Organized Labor and Industrial Conflicts* (1927) secs. 434-437; Martin, *Modern Law of*

this work, however, the secondary strike has been considered under the heading of strikes. In thus classifying the secondary strike, the distinction between such a strike and the secondary boycott is emphasized, for, as heretofore stated,¹³ there is a radical difference (a difference having legal consequences) between the meaning of the word "secondary" as employed in connection with the strike, and as employed in relation to the boycott. Likewise allocated for separate treatment is the picket. While picketing is simply a kind of boycott, the rise in the practice of picketing, and the legal problems peculiar to that activity which were thereby raised, have made it necessary to deal separately with the subject of picketing. Relatively few cases are found in the law books of the last decade, involving boycotts unconnected with the practice of picketing. The various reasons for the rise in the practice of picketing have been stated in the previous chapter on picketing.¹⁴ The Union Label is important in the history of the labor movement because it once (not so much today) played an important role in the program of boycotting. A separate chapter is devoted in this work to the Union Label.¹⁵

Blacklisting is an outstanding form of boycott, but here too the legal problems which have been occasioned by the practice of blacklisting have shunted the entire subject into channels peculiar to the practice. Hence the subject of blacklisting has been accorded separate treatment.¹⁶ The lockout, though seriously affected by National and State Labor Relations Acts, still continues to be an important weapon used by employers. The law governing the lockout will be found in the context of the discussion of strikes.¹⁷

This leaves for general treatment in connection with the subject of boycotting (1) concerted refusal to deal; (2)

Labor Unions (1910), *see* 77; Landis, *Cases on Labor Law* (1934) pp. 445-482

13. *See* section 103, *supra*.

14. *See* section 110, *supra*.

15. *See* *infra*, chapter twenty-six.

16. *See* *infra*, chapter twenty-seven.

17. *See* *supra*, section 83. *See* also, for cases involving shut-down, lock-out or removal of plant for the purpose of avoiding the obligation of bargaining collectively under the National Labor Relations Act, or otherwise circumventing the Act, *infra*, section 321.

efforts at persuasion, whether carried on by a single person or by many persons, and whether the person sought to be persuaded is the one with whom the dispute is had or a third person or persons, unless the activity takes the form of picketing; (3) efforts at coercion, whether carried on by a single person or by many persons, and whether the person sought to be coerced is the one with whom the dispute is had or a third person or persons, unless the activity takes the form of picketing. The exception of picketing is noted in relation both to persuasion and coercion because, as heretofore discussed,¹⁸ the courts are still divided on the question whether picketing partakes of the first or second form of activity.

Inclusion of the three general forms of boycotting above stated appears to be the most comprehensive while at the same time descriptive method of presenting the law as laid down in judicial decision. Wolman's classification of boycotts as either (1) backward; (2) forward; (3) lateral or (4) those wherein employers may become completely cut off from one another and from industry in general, as when manufacturers are boycotted as to transportation facilities, is said to rest "upon the conception of industry as being of a given complexity and composed of a number of strata, more or less homogeneous."¹⁹ While the classification may be interesting from the point of view of an understanding of the boycott in connection with its effect upon the economic order, legal analysis is not thereby helped, nor can the actual cases upon the subject be understood from such points of view.

Only the labor boycott will be considered in this work. The trade boycott, except insofar as a discussion of that form of boycott is necessary to illustrate a point in connection with the labor boycott, is beyond the scope of this work. Nor are consumers,' political or international boycotts here considered. Picketing in non-labor disputes,

18. See *supra*, sections 109, 111-112.

19. Wolman, *The Boycott in American Trade Unions* (1916).

however, has heretofore been given a good deal of discussion.²⁰

Section 144. Trade Boycotts and Labor Boycotts.

While, as stated in the preceding section, the boycott, regardless of its form, is subject to a single disability, no small measure of confusion has resulted in connection with boycott law from the result of certain cases which hold that trade boycotts are legal where, under similar circumstances, labor boycotts are unlawful. English judicial boycott law has provided the American judiciary with a heritage of confusion in relation to the subject in this connection, which American decisions have done much to extend and little to resolve. The fountain head of that confusion is found in three English cases, which have been called "the famous trilogy:"²¹ *Mogul Steamship Co. v. McGregor*,²² *Allen v. Flood*²³ and *Quinn v. Leathem*.²⁴ A better understanding of the law of boycott will result from a study of these three cases.

In *Mogul Steamship Co. v. McGregor*,²⁵ it appeared that owners of ships formed an association for the purpose of securing a carrying trade exclusively for themselves at profitable rates. The members agreed to regulate the number of ships to be sent by each member to the loading port, and the division of cargoes and freights to be demanded. It was further agreed that a rebate be given on the freights of all shippers who shipped only with members, and that agents of members be prohibited from acting in the interest of competing shipowners. The plaintiffs were excluded from the association. Thereafter, they sent ships to the loading port to endeavor to obtain cargoes, but the association, to interfere with the plaintiffs and to prevent them from obtaining cargoes, sent ships to the port, underbid the plaintiffs to the extent that they were obliged to carry

20. See section 134, *supra*.

21. In *Sorrell v. Smith* [1925] AC 700. See also Kennedy and Finkelman, *The Right to Trade: An Essay in the Law of Tort* (Toronto, 1923) p. 19.

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22. [1888] 21 QBD 544; [1889] 23 QBD 598; [1892] AC 25.

23. [1895] QBD 21, [1898] AC 1.

24. [1901] AC 495.

25. [1888] 21 QBD 544; [1889] 23 QBD 598; [1892] AC 25.

[1 Toller]

at unprofitable rates, threatened to dismiss agents if they loaded the plaintiffs' ships, and circulated a notice informing the trade that the rebate would not be allowed to anybody who shipped cargoes on the plaintiffs' vessels. Because the court felt it had no business telling the temporal world how "honest and peaceable trade was to be carried on", the plaintiffs were held not to have established a cause of action. If the Mogul case were the law, there would be little to the common law of boycotts.

In *Allen v. Flood*,²⁶ the plaintiffs, shipwrights employed on the repairs to the woodwork of a ship, were discharged by their employers because some ironworkers threatened to strike if the shipwrights were continued to be employed. The ironworkers, through their delegate, the defendant, took the position they did because the shipwrights had previously worked at ironwork on a ship for another firm, in contravention of the ironworkers' union rule against the practice of shipwrights working on iron. The threat was thus one designed to punish the plaintiffs for what they had done in the past. Here too, as in the Mogul case, the plaintiffs were held remediless. The fact that the defendant had acted maliciously did not affect the case, said the court, because malice is insufficient to lay the foundation for a cause of action where the act done is in itself lawful. If *Allen v. Flood* were the law today, there would be little need in employing the word "boycott" at all in relation to the common law, and a legal right could be perverted by malicious motives to ends utterly at variance with morals, all without the pale of the legal sanction.²⁷

In *Quinn v. Leatham*,²⁸ the plaintiff refused to discharge some assistants from his employment, nor to accede to the defendants, members of a labor union, in their demand that some of the plaintiff's employees be punished for working for the plaintiff without being members of the union, by being left out of work for twelve months. Thereupon the

26. [1895] 2 QB 21, [1898] AC 1.

27. The law in America today is generally in favor of liability for the doing of otherwise legally blame-

less deeds solely out of malice. See *supra*, section 70

28. [1901] AC 495.

defendants induced one of the plaintiff's employees to leave his employment in breach of his contract of employment. The defendants also induced a customer of the plaintiff to discontinue the purchase of any goods, by threatening to call out the customer's employees, if he continued to purchase goods. Upon these facts, a unanimous Court of Appeal affirmed the decision of the courts below, and found for the plaintiff. The fact that inducement to breach a contract was involved, played a large part in the decision.

English cases which followed the "trilogy" reaffirmed the holding of the *Mogul* case to the effect that trade boycotts were legal,²⁹ and likewise reaffirmed the holding of the court in *Quinn v. Leatham*³⁰ that labor boycotts were illegal.³¹ American cases, many of them citing the *Mogul* case, upheld trade boycotts upon the ground that they were designed to benefit the trade,³² while at the same time in many cases labor boycotts were held illegal per se because their primary intent was to injure somebody else and not to benefit the participants.³³ A semblance of truth was

29. See *Sorrell v. Smith* [1925] AC 700; *Ware & De Freville, Ltd. v. Motor Trade Ass'n.* [1921] 3 KB 40. *Hardie v. Lane Chilton* (1928) 2 KB 306. See also *Kennedy and Finkelman, The Right to Trade. An Essay in the Law of Tort* (Toronto, 1933).

30 [1901] AC 495.

31. See *Giblan v. National Amalgamated Labourers' Union of Great Britain and Ireland* [1903] 2 KB 600; *South Wales Miners' Federation v. Glamorgan Coal Company* [1903] 2 KB 545; [1905] AC 239.

32. See *Associated Hat Mfrs. v. Baird*, 88 Conn. 332, 91 A 373 (1914); *Master Builders Assn. v. Domascio*, 16 Colo App 25, 63 p 782 (1901); *Booker & Kinnaird v. Louisville Board of Fire Underwriters*, 188 Ky 771, 224 SW 451 (1920); *Brewster v. Millers' Sons Co.* 101 Ky 308, 41 SW 301 (1897); *McCarter v. Chamber of Commerce*, 128 Md 131, 94 A 541, (1915); *Klingel's Pharm.* 452

v. Sharpe & Dohme 104 Md 218, 61 A 1029 (1906); *Bowen v. Matheson*, 96 Mass 499 (1867); *Bohn Mfg Co v. Hollis*, 54 Minn 223, 55 NW 1119 (1893); *Arnold v. Burgess*, 269 NY 510 199 NE 511 (1935) affirming 241 AD 364, 272 NYS 534 (1934); *Collins v. Am News Co* 34 Misc 260, 69 NYS 638 (1901); *Cote v. Murphy*, 159 Pa 420, 28 A 190 (1894); *Buchanan v. Kerr*, 159 Pa 433, 28 A 195 (1894); *Macaulay v. Tierney*, 19 RI 255, 33 A 1 (1895); *McMaster v. Ford Motor Car Co* 122 SC 244, 115 SE 244 (1921); *Trade Press Pub Co v. Milwaukee Typographical U.* 180 Wis 419, 193 NW 507 (1923).

33. See *Carter v. Fortney*, 170 F 463 (CC ND Va 1909); *Casey v. Cincinnati Typographical Union*, 45 F 135, 12 LRA 193 (CC SD Ohio 1891); *Walsh v. Association of Master Plumbers*, 97 Mo App 280, 71 SW 455 (1902); *State v. Employers of Labor*, 102 Neb 768, 169 NW 717

thereby lent to those who claimed that the legal order was prejudiced against the collective efforts of workingmen.³⁴ Continued holdings by federal courts,³⁵ and by the several state courts both at common law³⁶ and under anti-trust

(1918). See also, in connection with secondary boycotts, *Onkes on Organized Labor and Industrial Conflicts* (section 428). " it may safely be affirmed that the view now prevailing in most of the courts of this country is that the secondary boycott may not be lawfully employed in a labor dispute although it is allowable in furtherance of a trade interest "

C/f cases holding in spite of the general rule recognizing a right to a free and open market (see section 12, *supra*) that a storekeeper has no right of action against an employer who conditions employment upon his employees' refraining from purchasing goods at the storekeeper's place of business, as where the employer seeks to divert his employees' trade to a company store (*Guethler v Altman*, 26 Ind App 587, 60 NE 355 (1901), *Lewis v Hue-Hodge Lumber Co* 121 La 658, 46 S 685 (1908); *Deon v Kirby Lumber Company*, 162 La 671, 111 S 55 (1927), *Heywood v Tilson*, 75 Me 225 (1883), *Dagostino v Rogers*, 68 Pa Super Ct 284 (1917), *Payne v Western*, etc R R Co 13 Lea 507 (Tenn 1884), *Robison v Texas Pine Land Ass'n*, (Tex Civ App) 40 SW 843 (1897), *Reding v Kroll*, *Sirev* (1898) 416 (Trib Luxembourg 1896) *Contra* *Graham v St Charles St R R Co* 47 La Ann 214, 16 S 806 (1895), *Webb v Drake*, 52 La Ann 290, 26 S 791 (1899) (where the rationale of the decision was the defendant's malice, thereby distinguishing the case from the Louisiana cases to the contrary, *supra*); *Wesley v. Native Lumber Co* 97 Miss 814, 53

S 346 (1910), *International, etc Ry. Co v Greenwood*, 21 SW 559 (Tex Civ App 1893)

34 See *Lewis, The Modern American Cases Arising Out of Trade and Labor Disputes* (1905) 491-492

35. *Eastern States Retail Lumber Ass'n v United States*, 234 US 600, 34 S Ct 951, 58 L Ed 1490 (1914); *Grenada Lumber Co v Mississippi*, 217 US 433, 30 S Ct 535, 54 L Ed 826 (1910), *Boyle v United States*, 40 F (2d) 866 (CA 7, 1930), *Arkansas Wholesale Grocers Assn v Federal Trade Commission*, 18 F(2d) 886 (CCA 8, 1927), cert den 275 US 533, 48 S Ct 30, 72 L Ed 411 (1927); *Wholesale Grocers Assn v Federal Trade Commission*, 277 F 657 (CCA 5, 1922) *Western Sugar Refinery Co v Federal Trade Commission*, 275 F 725 (CCA 9, 1921), *United States v Hollis* 246 F 611 (D CD Minn, 1917), *Knauer v United States*, 237 F 8 (CCA 8, 1916); *United States v Southern California Wholesale Grocers Ass'n*, 7 F(2d) 944 (DC SC Cal 1925) See also *Terminal Warehouse Co v Pennsylvania R Co* 297 US 500, 56 S Ct 546, 80 L Ed 527 (1936); *Paramount Famous Lasky Corporation v. United States*, 282 US 30, 51 S Ct 42, 75 L Ed 145 (1930); *United States v. American Livestock Commission Company*, 279 US 435, 49 S Ct 435, 73 L Ed 787 (1929).

36. *Aikins v Wisconsin*, 195 US 194, 25 S Ct 3, 49 L Ed 154 (1904); *Carlson v Carpenter Contractors' Association*, 305 Ill 331, 137 NE 222 (1922), *Carpenters Union v Citizens Committee to Enforce Landis Award*, 333 Ill 225, 164 NE 393 (1928), *Am. Dental Co. v. Central Dental Lab Co.*

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law³⁷ to the effect that trade and labor boycotts are subject to one and the same rule, that their common vice is the restriction of the right to a free and open market, and their common task the task of social justification, has done much and will do much to reinstate the balance scales which we picture as the administration of justice.

Section 145. Primary and Secondary Boycotts Distinguished.

American judicial decision has come into general agreement that there is a distinction between a primary boycott and a secondary boycott, and, as shall be seen hereafter, that the primary boycott, if peacefully carried on, is legal, while the secondary boycott is illegal because involving the exercise of coercion upon innocent third persons not parties to the dispute. While the distinction between the primary and secondary boycott has been thought by some to be a source of confusion rather than an aid to correct decisions,³⁸ the courts have used the terms too often and too long to turn back.

It needs to be pointed out, however, that the definitions given the words "primary" and "secondary" in this connection have changed in the last two decades. This change in definition needs to be explained if the law governing primary and secondary boycotts is to be understood. The earlier books limited the definition of the primary boycott to concerted activity exercised against the allegedly unfair person. Once like activity sought to enlist the aid of third parties, the boycott was no longer primary. This was the

256 Ill App 279 (1929); *Jackson v. Stanfield*, 137 Ind 592, 36 NE 345 (1893); *Martell v. White*, 185 Mass 255, 69 NE 1085 (1904); *Baldwin v. Escanaba Liquor Dealers Ass'n*, 165 Mich 88, 130 NW 214 (1911); *Newark Morning Ledger Co. v. Suburban Newsdealers Ass'n*, 9 NJ Misc 373, 154 A 534 (1931); *Walker v. Fort Worth Ins. Underwriters Ass'n*, 79 SW(2d) 661 (Tex Civ App; 1935); *Boutwell v. Marr*, 71 Vt 1 454

(1899); *Murray v. McGarigle*, 69 Wis 483 (1887)

37. *Walsh v. Ass'n of Master Plumbers*, 97 Mo App 280, 71 SW 455 (1902); *Ferd Helm Brewing Co. v. Bellinder*, 97 Mo App 64 (1902); *Strauss v. American Publishers Ass'n*, 177 NY 473, 69 NE 1107, 64 LRA 701, 101 Am St Rep 819 (1904).

38. See *Wolman, The Boycott in American Trade Unions* (1916); *Rest., Torts* (1930), ch. 38.

view taken by Laidler, in his excellent short work on the boycott.³⁹ This was also the basis of distinction adopted by Oakes in his work on *Organized Labor and Industrial Conflicts*,⁴⁰ and by Frankfurter and Greene in their work on the *Labor Injunction*.⁴¹ The better and at present generally accepted definitions of primary and secondary boycott, however, is that set forth by the United States Supreme Court in *Duplex Printing Co. v. Deering*:⁴² "The substance of the matters here complained of, is an interference with complainant's interstate trade, intended to have coercive effect upon complainant, and produced by what is commonly known as a 'secondary boycott,' that is, a combination not merely to refrain from dealing with complainant, or to advise or by peaceful means persuade complainant's customers to refrain ('primary boycott'), but to exercise coercive pressure upon such customers, actual or prospective, in

39. "A primary boycott may be defined as a simple combination of persons to suspend dealings with a party obnoxious to them, involving no attempt to persuade or coerce third parties to suspend dealings also.

A secondary boycott may be defined as a combination of workmen to induce or persuade third parties to cease business relations with those against whom there is a grievance. A compound boycott appears when the workmen use coercive and intimidating measures, as distinguished from mere persuasive measures in preventing third parties from dealing with the boycotted firms" Laidler, *Boycotts and the Labor Struggle*, p. 64.

40. "The primary boycott consists simply of cessation, by concerted action, of dealings with another, while in the case of secondary boycott, an attempt is made to procure parties outside the combination to cease dealing as well." Oakes, *Organized Labor and Industrial Conflicts* (1927), section 408. (However, in section 427 of his work, Oakes defines a sec-

ondary boycott as stated by the court in *Duplex Printing Press Co. v. Deering*, 254 US 443, 41 S Ct 172, 65 L Ed 349, 16 ALR 196 [1921]) See also, Adams and Sumner, *Labor Problems*, p 197; Clark, *The Law of the Employment of Labor*. 289 (1911); *Corpus Juris* (32 *Corpus Juris*, sections 233, 251) distinguishes a primary boycott (concerted suspension of dealing) from a secondary boycott (coercion of third parties) and also from a third type of boycott "which as yet the courts have not defined" (persuasion of third parties).

41. p 43. "The so-called primary boycott, a mere withholding of patronage and refusal to trade . . ." However, a secondary boycott is then defined in terms of pressure upon third parties. Later on in the same paragraph, however, "merely notice by circularization, banners or publication" is included within the framework of secondary boycott.

42. 254 US 443, 41 S Ct 177, 65 L Ed 349, 16 ALR 196 (1921).

order to cause them to withhold or withdraw patronage from complainant through fear of loss or damage to themselves should they deal with it." This distinction between primary and secondary boycott was reiterated by the High Court in *Truax v. Corrigan*⁴³ where the court said that "A secondary boycott . . . is where many combine to injure one in his business by coercing third persons against their will to cease patronizing him by threats of similar injury," and it has been accepted by a number of courts.⁴⁴ It is the proper basis of distinction, because the term "secondary boycott" is then given its natural meaning, viz., a boycott of a person not involved in the primary dispute. Mere attempts at persuasion of third parties should not suffice to characterize such attempts as in the nature of a secondary boycott, since nobody but the person involved in the primary dispute is under such circumstances being boycotted. It has never been suggested that pickets engaged in peaceful primary picketing may be said to be engaging in secondary picketing where, without picketing third parties, they seek whether through the distribution of literature or otherwise to enlist the support of such third parties. Secondary picketing is thus generally conceded to mean picketing and not merely persuading of third parties. Upon the same ground, the term secondary boycotting ought to be reserved to describe the case where third parties are actually themselves boycotted and not merely sought to be persuaded. It is in the sense that *Duplex Printing Co. v.*

43. 257 U.S. 312, 42 S.Ct. 124, 66 L. Ed. 254, 27 ALR 375 (1921).

44. See *Paramount Pictures v. United Motion Picture Theatre Owners*, 93 F(2d) 714 (CCA 3, 1937); *Edelstein v. Gilmore*, 35 F(2d) 723 (CCA 2, 1929), cert. den. 280 U.S. 607, 50 S.Ct. 153, 74 L. Ed. 650 (1930); *Paramount Enterprises v. Mitchell*, 104 Fla. 407, 140 S. 328 (1932); *Bayonne Textile Corporation v. American Fed. of Silk Workers*, 116 NJ Eq. 146, 172 A. 551, 92 ALR 1450;

Van Buskirk v. Sign Painters' Local, 127 NJ Eq. 533, 14 A(2d) 45 (1940); *Goldfinger v. Feintuch*, 276 NY 281, 11 NE(2d) 910, 116 ALR 477 (1937); *Beckerman v. Baking & Confectionery Workers Union*, 28 Ohio NP (NS) 550 (1931); *Bomes v. Providence Local*, R. I. 155 A. 581 (1931). See also *Harper on Torts* (1933) p. 401. A good discussion is contained in *United Union v. Dave Beck*, 100 Wash. Dec. 412, 93 P(2d) 772 (1939).

Deering⁴⁵ and the many other more recent cases define and distinguish the terms, that the words "primary boycott" and "secondary boycott" have heretofore been and will hereafter be used in this work.

Because of this evolution in the method used by the courts to distinguish between primary boycotts and secondary boycotts, it is difficult if not impossible to present any general statement of the law governing primary as distinguished from secondary boycotts.

There is still another factor which has made for confusion. The factor referred to is the practice of some courts to define the boycott solely in terms of coercion of third parties. Martin, in his work on Labor Unions, thus presented what was in 1910 a generalization to be gleaned from the cases:⁴⁶ "A boycott may be defined as a combination to cause a loss to one person by coercing others against their will, to withdraw from their beneficial business intercourse, by threats that unless those others do so, the combination will cause similar loss to them, or by the use of such means as the infliction of bodily harm on them or such intimidation as will put them in fear of bodily harm." Enough has been said to indicate that generalities about boycotts are impossible. It is largely for this reason that the threefold classification of boycotts set forth in a preceding section⁴⁷ has been determined upon as the method of presenting the subject in this work.⁴⁸

45 254 US 443, 41 S Ct 177, 65 L Ed 349, 16 ALR 196 (1921)

46. Martin, *Modern Law of Labor Unions* (1910), p 103. See *Gray v Building Trades Council*, 91 Minn 171, 97 NW 663, 63 LRA 753, 103 Am St Rep 477, 1 Ann Cas 172 (1903)

47. Section 144, *supra*

48. Mention should also be made of cases which hold the given labor activity to be legal because not constituting a boycott, or vice versa, without defining the sense in which the term boycott is used. See *Crescent Planing Mill Co. v. Mueller*, 123

SW(2d) 193 (Mo App 1939), transferred 117 SW(2d) 247, 118 ALR 709 (Mo App 1938). *Gray v Building Trades Council*, 91 Minn 171, 97 NW 663, 1118, 63 LRA 753, 103 Am St Rep 477, 1 Ann Cas 172 (1903); *Stoffes v. M.P.M.O.U.*, 136 Minn 200, 161 NW 524 (1917). See Rest. Torts (1939) sec 801: "Some conduct of the kind dealt with in this Topic [concerted action by employees against their employer in aid of a dispute between another employer and his employees] as well as some of the conduct dealt with in Topic 3 [legality of various types of concert-

Section 146. Who May Enjoin Secondary Boycott.

The decisions appear to make no distinction, as concerns the legality of the secondary boycott, between the case where the complainant is the third party boycotted, and where, on the other hand, the complainant is the person involved in the primary boycott. In the usual case it is not the boycotted third party but rather the person involved in the primary boycott who is the party plaintiff. However, there are several cases where the boycotted third party either brought the suit to enjoin, or intervene in the action brought by the person involved in the primary boycott.⁴⁹ In point of logic, there is said to be basis for questioning the correctness of the rule holding a primary boycott legal and hence unenjoinable at the instance of the person involved in the primary boycott (having in mind that a primary boycott includes the case where third parties are sought to be persuaded and not coerced by boycott upon them) while at the same time holding illegal the secondary boycott, where the complainant is likewise the party involved in the primary boycott. It has been suggested that a distinction ought to be made. "What few courts appear

ed action by employees in aid of dispute with own employer), is frequently called 'secondary boycott.' That phrase has such an uncertain meaning and is so frequently applied to such diverse situations that it is not used in the Restatement of this Subject. Instead, specific conduct is described and its legality discussed "

49. See *Evening Times Printing & Pub. Co. v. American Newspaper Guild*, 122 N.J. Eq. 545, 195 A. 378 (1937); *American Gas Stations v. Doe*, 250 A.D. 227, 293 N.Y.S. 1019 (1937); *Gertz v. Randau*, 162 Misc. 786, 295 N.Y.S. 871 (1937); *Mille. Reif v. Randau*, 166 Misc. 247, 1 N.Y.S. (2d) 515 (1937), *International Ass'n v. Federated Ass'n*, 109 S.W. (2d) 301 (1937). Cf. *People v. Gilbert*, 12 N.Y.S. (2d) 632 (Ct. of Special Sessions App. Pt., 1939) where the com-

plainant installed an electrically operated coin phonograph at a bar and grill. It appeared that complainant was to service the phonograph himself, while the phonograph which had theretofore been playing in the bar and grill and which the complainant's phonograph replaced, had been serviced by a labor union of which the defendant was a member. The defendant commenced to picket the bar and grill, requesting patrons not to patronize the phonograph because "it was unfair to members" of his union. The appellate court refused to sustain the defendant's conviction of disorderly conduct by the court below. The court said: "The owner of the bar and grill made no complaint, so that the question of a secondary boycott as to him did not arise."

to take into consideration in cases of this character" states a writer upon the subject,⁵⁰ "but what it is suggested they might with considerable logic rely upon as an important factor, is whether the person primarily boycotted or the person secondarily affected is the complaining party. Where the one who seeks relief from a secondary boycott is a person against whom the labor organization has no grievance other than that he deals with one participating in a dispute with the union, it would seem that greater justification for judicial interference would exist than in the situation in which the original disputant is the complaining party." There is, however, a difficulty involved in this viewpoint. When a party involved in a primary boycott sues to enjoin a secondary boycott, he complains in effect that the third party would have purchased goods from him or otherwise continued business relations with him, were it not for the fact that he himself is being boycotted. Mere persuasion would not have deterred him; boycott leaves him powerless to resist. The right to a free and open market includes the right to enjoin the coercing of those who would, but for such coercion, continue to deal with the complainant. That one should have a legally enforceable right in the free actions of another is not new to our law. The United States Supreme Court recognized the existence of such a right in *Truax v. Raich*.⁵¹ In that case the constitutionality of an Arizona statute was before the court for disposition. The statute forbade the employment of aliens under certain circumstances. The complainant, a non-citizen resident of Arizona and an at-will employee, was discharged solely because of the existence of the statute. The state contended that the plaintiff had no standing in court because the employment being at will, his employer could discharge him for no reason at all. But the court replied: "The fact that the employment is at the will of the parties respectively, does not make it one at the will of

50. Annotation, *The Boycott as a Weapon in Industrial Disputes*, 116 ALR 484, 510 (1938). See also Eskin, *The Legality of "Peaceful Coercion"* in *Labor Disputes* (1937), 85 U of Pa L Rev 456, 478-480.

51. 239 US 33, 30 S Ct 7, 60 L Ed 131 (1915).

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others. The employee has manifest interest in the freedom of the employer to exercise his judgment without illegal interference or compulsion and, by the weight of authority, the unjustified interference of third persons is actionable although the employment is at will."

Section 147. Concerted Refusal to Deal.

The right of an individual to refuse to deal or to cease dealing with another is generally just as absolute as the right of an individual to quit his employment regardless of his reason for so doing.⁵² Thus the attempt by the Federal Trade Commission to enjoin under the Trade Commission Act, a wholesale dealer from stopping to deal with a manufacturer, where the dealer did so because he thought the manufacturer was undermining the dealer's trade by selling to competing wholesale dealers or to a retailer competing with the wholesale dealer's customers, met with an adverse holding by the United States Supreme Court.⁵³

The generality is not, however, without exception. Public utilities are outstanding instances of businesses which must deal with all alike, and under statutes in some of the states public utilities are not permitted to cease doing business without the state's consent. Again, there are statutes in several states which prohibit businesses of a public nature, such as restaurants or theatres, from discriminating against customers on account of their race, creed or color. Provisions against discrimination are also found in the Clayton Act⁵⁴ and in the Robinson-Patman Act.⁵⁵ It has

⁵² Federal Trade Commission v Raymond Bros.-Clark Co 263 US 565 44 S Ct 162, 68 L Ed 418 (1924), United States v Colgate & Co 250 US 300, 39 S Ct 465 63 L Ed 992 (1919); Locker v American Tobacco Co 195 NY 565, 88 NE 289 (1909) Rest, Torts (1939), sec 763 "The privilege stated in this section exists regardless of the actor's motive for refusing to enter business relations with the other and even

though the sole motive is a desire to harm the other" Ibid, sec. 763 (c).

⁵³ Federal Trade Commission v. Raymond Bros.-Clark Co 263 US 565, 44 S Ct 162, 68 L Ed 448 (1924)

⁵⁴ Act of October 15, 1914, c 323, 38 Stat 730, 15 USCA secs. 12-27, 44, 18 USCA sec 412; 28 USCA secs. 381-383, 386-390, 29 USCA sec. 52

⁵⁵ Act of June 19, 1936, c. 592,

been held that A's refusal to deal with B unless B breaks his contract with C is actionable as an unlawful interference with contractual relations.⁵⁶ Thus limited, the generality of an individual's right to refuse to deal may be reiterated.

In one case it was contended that captious or malicious refusal to sell is actionable even where the person so refusing acts alone, where his business is so large as, by refusing to sell, he destroys the business of the person refused. But the court held otherwise,⁵⁷ saying: "It is contended, however, that a different rule should prevail where a single person or corporation controls substantially the whole production or output of a staple article. I do not think the extent of the business can affect the rights of the parties. If it is an inherent right of the owner of property to refuse to sell his property to any particular individual, he cannot be deprived of that right simply because of the magnitude of his business or his wealth. Nor do I see how the courts could well draw a line between individuals and corporations who may exercise their full right of property, and those to whom, on account of their wealth, that right is to be denied."⁵⁸ Concerted refusal to deal, upon the other hand, involving as it does a restriction upon the right to a free and open market, has stood upon a different basis since the earliest of reported cases. Legality has fol-

49 Stat 1526, 15 USCA secs 13 et seq.

⁵⁶ *Schulten v Bavarian Brewing Co.* 98 Ky 224, 28 SW 504 (1894). *Carew v Rutherford*, 106 Mass 1, 8 Am Rep 287 (1870). *C/f Raymond Bros-Clark Co v Fed Trade Commission*, 280 F 529 (CCA 8, 1922). *Andrew-Jergens Co v Woodbury*, 271 F 43 (DCD Del 1920). See *Carpenter Interference with Contract Relations* (1928), 41 Harv L Rev 723, 754-755.

⁵⁷ *Locker v. American Tobacco Co.* 195 NY 565, 88 NE 289 (1909).

⁵⁸ C/f cases holding picketing illegal or subject to greater disability, where exercised in connection with a "small" as distinguished from a "large" business. *Dolan v. Cooks Union*, 124 NJ Eq 584, 4 A(2d) 5 (1938). *Stalban v. Friedman*, 171 Misc 106, 11 NYS(2d) 343 (1939), rev'd 258 AD 516 17 NYS(2d) 144 (1940). See also Rest. Torts (1939) sec. 764. "One who in his business refuses to deal with another in order to establish or maintain an illegal monopoly is liable to the other for the harm caused thereby."

lowed only upon a showing that the purpose sought to be accomplished by the concert is lawful.⁵⁹

Section 148. Persuasion of Third Parties.

The view was at one time entertained, and by high authority, that "There is no wrong in persuading or inducing a man to do what he has a right or is lawfully free to do. The fact that such action may damage a third person can of itself no more give that person a right of action against the persuader than against the actor himself."⁶⁰ It is now well settled, however, that the right of a labor union to persuade third parties against dealing with one involved in a labor dispute is *prima facie* an actionable wrong, which, to be legal, must be justified by a lawful purpose.⁶¹ The

59. *Hanchett v Chiatovich*, 101 F 742, 41 CCA 648 (CCA 9, 1900); *Hart v B F Keith Vandeville Exch* 12 F(2d) 341 (CCA 2, 1926); *Truax v Bisbee*, 19 Ariz 379, 171 P 121 (1918); *Overland Pub. Co. v. Union Lithograph Co.* 57 Cal App 366, 207 P 412 (1912); *Master Builders' Assn v Domascio*, 16 Colo App 25, 63 P 782 (1901); *Wilson v. Hey*, 232 Ill 389, 83 NE 929, 13 Ann Cas 82, 16 LRA(NS) 85, 122 Am St Rep 119 (1908); *Ulery v. Chicago Live Stock Exch* 54 Ill App 233 (1894); *Rohlf v Kasemeier*, 140 Iowa 182, 118 NW 276, 23 LRA(NS) 1284, 132 Am St Rep 61, 17 Ann Cas 750 (1908); *Graham v. St Charles Street R Co.* 47 La Ann 214, 15 S 806, 49 Am St Rep 366, 27 LRA 460 (1895); *Folsom Engraving Co. v McNeil*, 235 Mass 269, 126 NE 479 (1920), *Godin v. Niebuhr*, 236 Mass 350, 128 NE 406 (1920); *Carew v. Rutherford*, 106 Mass 1, 8 Am Rep 287 (1870), *George J Grant Construction Co. v. St. Paul Bldg. Trades Council*, 136 Minn 167, 161 NW 520 (1917); *Scott-Stafford Opera House Co. v. Minneapolis Musicians Ass'n*, 118 Minn 410, 136 NW 1092; *Wesley v. Native Lumber Co.* 97 Miss 814, 53

S 346, Ann Cas 1912D, 786 (1910); *Stephens v. Mound City Liverymen & Undertakers Ass'n*, 205 Mo 596, 246 SW 40 (1922), *Glavish v. Kansas City Live Stock Exch* 113 Mo App 726, 89 SW 77 (1905) *Empire Theatre Co. v. Cloke*, 53 Mont 183, 163 P 107, LRA1917E (1917); *Lindsay & Co. v. Montana Federation of Labor*, 37 Mont 264, 96 P 127, 127 Am St Rep 722, 18 LRA(NS) 707 (1908); *Collins v American News Co* 34 Misc 260, 69 NYS 638 (1901), *affd* 68 AD 639, 74 NYS 1123 (1902), *Buchanan v Kerr*, 159 P 433, 28 A 195 (1894); *Patterson v Building Trades Council*, 11 Pa Dist R 500 (1902), *Delz v. Winfree*, 80 Tex 400, 16 SW 111, 26 Am St Rep 755 (1891), *Palatine Ins Co. v. Griffin*, 202 SW 1014 (Tex Civ App, 1918), *West Virginia Transp Co. v Standard Oil Co.* 50 W Va 611, 40 SE 591, 56 LRA 802, 88 Am St Rep 805 (1900); *see also Rest., Torts* (1939) *sec.* 765.

60. *Sir Frederick Pollack*, 14 LQ Rev 129. *See also Oakes, Organized Labor and Industrial Conflicts* (1927) pp. 612-613; *Chapin on Torts*, p 437.

61. *Kroger Grocery & Baking Co. v. Retail Clerks Assn.* 250 F 890 (DC

elements which go into the issue of justification have heretofore been considered.⁶² The right to a free and open market is infringed and impaired by persuasion of third parties to the same extent as by concerted refusal to deal and the rules of law governing each of these activities are generally the same. The right to injunctive relief against false bannerings has heretofore been discussed,⁶³ as has likewise the question whether picketing partakes of the nature of persuasion or coercion.⁶⁴ The rule governing the legality of persuasion is the same whether the persuasion is carried on by banners, post-cards, newspaper advertisements, circulars, speech making or other forms of propaganda. The holding of street meetings has been held a proper form of persuasion,⁶⁵ as has also broadcasting over the radio,⁶⁶ and driving through the streets with an automobile equipped with sound apparatus broadcasting music

ED Mo 1918), *United Chain Theatres v. Philadelphia M P M O U.* 50 F(2d) 189 (DC ED Pa 1931); *Truax v. Bisbee Local*, 19 Ariz 379, 171 P 121 (1918); *Watters v. Retail Clerks Union*, 120 Ga 424, 47 SE 911 (1904); *Lietzman v. Radio Broadcasting Station*, 282 Ill App 203 (1935); *Phillip Henri Co. v. Alexander*, 198 Ill App 568 (1918); *Vonder-Schmitt v. McGuire*, 100 Ind App 632, 195 NE 585 (1935); *Beck v. Railway Teamsters' Protective Union*, 118 Mich 497, 42 LRA 407, 77 NW 13, 74 Am St Rep 421 (1898); *Ex parte Heffron*, 179 Mo App 639, 162 SW 652 (1914); *Root v. Anderson*, 207 SW 255 (Mo 1918); *Heitkemper v. Hoffmann*, 99 Misc 543, 164 NYS 533 (1917); *People v. Radt*, 15 NY Crim Rep 174, 71 NYS 846 (1900); *Wise Shoe Co. v. Lowenthal*, 266 NY 264, 194 NE 749 (1935); *Nann v. Raimist*, 255 NY 307, 174 NE 690, 73 ALR 669 (1931); *Goldfinger v. Feintuch*, 276 NY 281, 11 NE(2d) 910, 116 ALR 477 (1937); *State v. Van Pelt*, 136 NC 633, 49 SE 177, 68 LRA 760, 1 Ann Cas 495

(1904); *Riggs v. Cincinnati Waiters Alliance*, 5 Ohio NP 386, 8 Ohio S & C P Dec 565 (1898); *S. A. Clark Lunch Co. v. Cleveland Waiters* 22 Ohio App 265, 154 NE 362 (1926); *Blumauer v. Portland M P M O U.* 141 Or 399, 17 P(2d) 1115 (1933); *Kirmse v. Adler*, 311 Pa 78, 166 A 566 (1933); *Bomes v. Providence Local*, 51 RI 499, 155 A 581 (1931); *Zaat v. Building Trades Council*, 172 Wash 445, 20 P(2d) 589 (1933); *Sterling Chain Theatres v. Central Labor Council*, 155 Wash 217, 283 P 1081 (1930); *Kimbal v. Lumber, etc. Union*, 189 Wash 416, 65 P(2d) 1066 (1937).

62. See sections 69-77, *supra*.

63. See section 128, *supra*.

64. See sections 109, 111, 112, *supra*.

65. *Green v. Samuelson*, 168 Md 421, 178 A 109, 99 ALR 528 (1935); *Public Baking Co. v. Stern*, 127 Misc 229, 215 NYS 537 (1926).

66. *Leitzman v. Radio Broadcasting Station*, 282 Ill App 203 (1935).

and the issues involved in the labor dispute.⁶⁷ Boycotting has been held illegal if carried on in breach of contract.⁶⁸

Section 149. Purposes for Which Boycotts May or May Not Be Carried On.

The legality of purpose in connection with boycotts generally parallels holdings passing upon similar purposes sought to be achieved by strikes and picketing. Thus boycotting to secure higher wages, shorter hours or better conditions of employment has been held legal,⁶⁹ while boycotts carried on to compel an employer to maintain minimum sales prices have been proscribed.⁷⁰ Boycotting in connection with a jurisdictional dispute has been held illegal.⁷¹ Cases involving picketing have almost monopolized the scene of interest in the last decade, with the result that it is in connection with picketing that the lawfulness of purpose in connection with boycotting is often tested.⁷² The great bulk of cases having to do with legality of purpose nevertheless remain those dealing with strikes.⁷³

Boycotts carried on for the closed shop have met with a division of opinion analogous to that occasioned by strikes and picketing carried on for like purpose. In some cases, boycotts for such purpose are held illegal,⁷⁴ while in others

67. *Kirmse v. Adler*, 311 P. 78, 166 A. 566 (1933). See also *United Chain Theatres v. Philadelphia M. P. M. O. U.*, 50 F.(2d) 189 (DC Ed. Pa. 1931); *C/f De Agostina v. Holmden*, 157 Misc. 819, 285 NYS 909 (1935); *Goldfinger v. Feintuch*, 276 NY 281, 11 NE(2d) 910, 116 ALR 477 (1937); *Eaco Operating Corp. v. Kaplan*, 144 Misc. 646, 238 NYS 303 (1932).

68. *Perfect Laundry Co. v. Marsh*, 121 NJ Eq. 588, 191 A. 774 (1937).

69. *Edelstein v. Gillmore*, 35 F.(2d) 723 (CCA 2, 1929), cert. den. 280 US 607, 50 S. Ct. 153, 74 L. Ed. 650 (1930); *Perfect Laundry Co. v. Marsh*, 120 NJ Eq. 508, 186 A. 470 (1936) rev. on other grounds in 121 NJ Eq. 588, 191 A. 774 (1937); *Kimbel v. Lumber Union*, 189 Wash. 416, 464

65 P.(2d) 1066 (1937).

70. *Elhs v. Journeyman Barbers' Int'l Union*, 194 Iowa 1179, 191 NW 111, 32 ALR 756 (1922).

71. *Armstrong Cork & Insulation Co. v. Walsh*, 276 Mass. 263, 177 NE 2 (1930).

72. See section 14, *supra*.

73. See sections 85-102, *supra*.

74. *Anderson & L. Mfg. Co. v. Carpenters' Dist. Council*, 308 Ill. 488, 139 NE 887 (1923); *Hotel v. Miller*, 272 Ky. 471, 114 SW(2d) 501 (1938); *Keith Theatre v. Vachon*, 131 Me. 392, 187 A. 692 (1936); *A. T. Stearns Lumber Co. v. Howlett*, 260 Mass. 45, 157 NE 82, 52 ALR 1125 (1927); *Culinary Workers Union v. Fuller*, 105 SW(2d) 295 (Tex. Civ. App. 1937); *Safeway Stores v. Retail*

they are held clothed with the sanction of the law.⁷⁶

It has been held that labor unions may carry on a boycott only for the purpose of securing immediate benefits, such as better conditions of employment, or higher wages or fewer hours of employment, and that a boycott carried on to compel collective bargaining is consequently illegal.⁷⁶ The authority of such cases are extremely doubtful in the light of the development of labor law in recent years.⁷⁷ Indeed, the view has been taken that the test of legality in connection with labor activity is the extent to which it has as its purpose the strengthening of the union for the purpose of collective bargaining.⁷⁸ A boycott carried on for the purpose of enforcing the terms of a collective bargaining agreement has been held legal.⁷⁹

It has been held that the right to persuade by means other than striking or picketing is greater than the right to strike or to picket, and hence that, for example, though picketing may not be carried on in the given jurisdiction under certain circumstances, or to accomplish certain purposes, other forms of persuasion such as speechmaking, concerted refusal to deal or the distribution of leaflets are permissible. In *Green v. Samuelson*,⁸⁰ which is an outstanding case in point, Negroes were prohibited from picketing the complainant's establishment for the purpose of securing the

Clerks Union, 184 Wash 322, 51 P (2d) 372 (1935)

75. *Schuster v International Ass'n*, 293 Ill App 177, 12 NE(2d) 50 (1938), *Scotes v Helmar*, 205 Ind 596, 187 NE 662 (1933), *S A Clark Lunch Co v Cleveland Waiters & B D Local*, 22 Ohio App 205 154 NE 362 (1926)

76. *Heitkemper v Central Labor Council*, 99 Or 1, 192 P 765 (1920) See also *Re Higgins*, 27 F 443 (CC ND Tex 1886); *Wabash R Co v Hannahan*, 121 F 563 (CC ED Mo 1903); *Turnstall v Stearns*, 192 F 808, 113 CCA 132, 41 LRA(NS) 453 (CCA 6, 1911); *Reynolds v. Davis*,

198 Mass 294, 84 NE 457, 17 LRA (NS) 162 (1908)

77. An outstanding early case holding strengthening of a union for the purpose of collective bargaining to be a proper object of labor activity is *Michaels v Hillman*, 112 Misc 395, 183 NYS 195 (1920)

78. *Rest, Torts* (1939), p 82. See section 91, *supra*.

79. *Greenfield v Central Labor Council*, 104 Or 236, 192 P 783, 207 P 168 (1920) See, for the legality of strikes called for the same purpose, *supra*, section 87; *infra*, section 163.

80. 168 Md 421, 178 A 109, 99 ALR 528 (1935).

employment by the complainant of Negroes instead of whites. Nevertheless the court permitted the Negroes to hold street meetings and to make public speeches and otherwise to seek the public support in connection with their purpose. The defendants had the rights, the court said, to refuse to patronize the picketed merchants and to act in concert in doing so, and the further right to persuade third parties by propaganda not involving picketing.

Section 150. Coercion of Third Parties.

Coercion of third parties as a means of carrying on a boycott has generally been held unlawful,⁸¹ and this wheth-

81. Duplex Printing Press Co. v Deering, 254 US 443, 41 S Ct 172, 65 L Ed 349, 16 ALR 196 (1921). Loewe v. California State Federation of Labor, 139 F 71 (CC ND Cal 1905), 189 F 714 (CC ND Cal 1911). Old Dominion S S Co v McKenna, 30 F 48, 18 Abb NC 262 (CC SD NY 1887). Casey v Cincinnati Typographical Union, 45 F 145, 12 LRA 193 (CCD Colo 1891). Seattle Brewing & Malting Co v. Hansen, 144 F 1011 (CC ND Cal 1905). Rocky Mountain Bell Telephone Co v. Montana Federation of Labor, 156 F 809 (CCD Mont 1907). United Chain Theatres v. Philadelphia Moving Picture Machine Op. U. 50 F (2d) 180 (DC Pa 1931). Irving v. Joint District Council, 180 F 896 (DC SD NY 1910). Irving v. Neal, 209 F 471 (DC SD NY 1913). Central Metal Products Corp. v. O'Brien, 278 F 827 (DC ND Ohio 1922). Rosenberg v. Retail Clerks' Assn. 39 Cal App 67, 177 P 864 (1918). R. an W Hat Shop v. Sculley, 98 Conn 1, 118 A 55, 29 ALR 551 (1922). State v. Glidden, 55 Conn 46, 8 A 890 (1887). Paramount Enterprises v. Mitchell, 104 Fla 407, 140 S 328 (1932). Brown v. Jacobs Pharmacy Co. 115 Ga 429, 41 SE 553, 57 LRA 547, 90 Am St Rep 126 (1902). Robi-

son v. Hotel & Restaurant Employees Local, 35 Idaho 418, 207 P 132, 27 ALR 642 (1922). Doremus v. Hennessy, 176 Ill 608, 52 NE 924, 54 NE 524, 43 LRA 797, 68 Am St Rep 203 (1898). Carlson v Carpenter Contractors' Assn 305 Ill 331, 137 NE 222, 27 ALR 625 (1922). Anderson & L Mfg Co. v Carpenters Dist Council, 308 Ill 488, 139 NE 887 (1922). Wilson v Hey, 232 Ill 389, 83 NE 928 (1908). Jackson v. Stanfield, 137 Ind 502, 37 NE 14, 23 LRA 588, 36 NE 345 (1894). Funk v. Farmers Elevator Co. 142 Ia 621, 121 NW 53, 24 LRA(NS) 108 (1909). Underhill v. Murphy, 117 Ky 640, 78 SW 482, 111 Am St Rep 262, 4 Ann Cas 780 (1904). Webb v. Drake, 52 La Ann 290, 26 S 791 (1899). Blandford v. Duthie, 147 Md 388, 128 A 138 (1925). A. T. Stearns Lumber Co. v. Howlett, 260 Mass 45, 157 NE 82 (1927) 163 NE 103 (1928). New England Cement Gun Co v McGivern, 218 Mass 198, 105 NE 885, LRA1910C (1914). Armstrong Cork & Insulation Co. v. Walsh, 276 Mass 263, 177 NE 2 (1931). Beck v. Railway Teamsters' Protective Union, 118 Mich 497, 77 NW 13, 42 LRA 407, 77 Am St Rep 421 (1898). Lohse Patent Door v. Fuelle, 215 Mo 421, 114 SW 997 [1 Teller]

er the coercion is directed against the suppliers or customers of the person involved in the primary boycott.⁸³ Decisions are, however, to be found which hold to the contrary, although the reasons for these holdings are not made clear.⁸⁴ The position taken in the cases is that the third party, being innocent in connection with the primary dispute, ought not to be subjected to boycott simply because, through dealing with one of the parties thereto, he meets with the displeasure of the boycotters. As stated in *Pacific*

(1908); *Re Heffron*, 179 Mo App 639, 162 SW 652 (1914); *Loizeaux Lumber Co. v Carpenters Local*, 5 Law & Labor 250 (NJ Ch 1923); *Alfred W Booth & Bro. v Burgess*, 72 NJ Eq 181, 65 A 226 (1906); *Fink v. Butchers' Union*, 84 NJ Eq 638, 95 A 182 (1915); *Thomson Mach Co v Brown*, 89 NJ Eq 326, 104 A 129, 108 A 110 (1918); *Barr v Essex Trades Council*, 53 NJ Eq 101, 30 A 881 (1894); *Auburn Draying Co v. Wardell*, 227 NY 1, 124 NE 97, 6 ALR 901 (1919); *Pleaters' & Stitchers' Assn v. Taft*, 131 Misc 506, 227 NYS 185 (1928); *Mulholland v. Waiters' Local Union*, 13 Ohio S. & C. P. Dec. 342 (1902); *McCormick v. Local Unions*, 32 Ohio CC 165 (1911); *Moore v Bricklayers' Union*, 23 Wkly Cin Law Bull 48, 10 Ohio Dec Rep 665 (1889); *Longshore Printing Co. v. Howell*, 26 Or 527, 38 P 547, 28 LRA 464, 46 Am St Rep 640 (1894); *Brace Bros v Evans*, 5 Pa Co Ct 163 (1888); *York Mfg Co. v. Oberdick*, 10 Pa Dist 403 (1901); *Webb v. Cooks' Union*, 205 SW 465 (Tex Civ App 1918); *Crump v. Commonwealth*, 84 Va 927, 6 SE 620 (1888); *Pacific Typesetting Co. v Int'l Typographical Union*, 125 Wash 273, 210 P 358, 32 ALR 767 (1923); *Parker Paint & Wall Paper Co. v. Local Union*, 87 W Va 631, 105 SE 911, 16 ALR 222 (1921).

83. *C/f Iron Molders' Union v.*

Allie-Chalmers Co. 166 F 45, 20 LRA (NS) 315, 91 CCA 631 (CCA 7, 1908) where the court indicated that coercion of the suppliers of the person involved in the primary boycott was legal, though like coercion of his customers would be illegal. The court said "To whatever extent employers may lawfully combine and cooperate to control the supply and the conditions of work to be done, to the same extent should be recognized the right of workmen, to combine and cooperate to control the supply and the conditions of the labor that is necessary to the doing of the work."

83. See *Gill Engraving Co v Doerr*, 214 F 111 (DC SD NY 1914); *Lisse v. Local Union*, 24 P(2d) 833 (Cal 1933), 2 Cal(2d) 312, 41 P(2d) 314 (1935); *Parkinson v Building Trades Council*, 154 Cal 581, 98 P 1027 (1908); *Pierce v Stablemen's Union*, 156 Cal 70, 103 P 324 (1900); *Gray v Building Trades Council*, 91 Minn 171, 97 NW 663, 63 LRA 753, 103 Am St Rep 477, 1 Ann Cas 172 (1903); *Grant Construction Co v St Paul Building Trades Council*, 136 Minn 167, 161 NW 520 (1917); *Empire Theatre Co. v. Cloke*, 53 Mont 183, 163 P 107, LRA1917E, 383 (1917).

A secondary boycott is declared to be an "unfair labor practice" under the Wisconsin Labor Relations Act (Laws 1939, Chapter 57, section 111.06 [g])

Typesetting Co. v. International Typographical Union,⁸⁴ "The courts holding that a secondary boycott is unlawful have done so upon the broad theory that one not a party to industrial strife cannot, against his will, be made an ally of either one of the parties for the purpose of accomplishing the destruction of the other." Labor's contention, as heretofore analyzed in connection with secondary picketing,⁸⁵ is that the third party comes within the vice of the primary dispute by actively aiding the person involved therein, whether by purchasing his goods, or selling merchandise to him, or remaining in his employ. It has heretofore been seen that, at least in the State of New York, labor's contention has been recognized,⁸⁶ albeit qualifiedly,⁸⁷ in the law books. The Restatement,⁸⁸ as heretofore stated in greater detail,⁸⁹ recognizes the legality of pressure exerted upon third parties with the limitations (1) that the third party must be permitted to sell, unmolested, such stock as he may have on hand,⁹⁰ (2) that the coercion must be directed solely against the product of the person involved in the primary dispute, and not against the third person generally.⁹¹

It has been held in some cases that third parties may not be said to be coerced in the sense here employed, and that the situation is consequently not tantamount to a secondary boycott, when the third party is given or is left an alternative course of action. This appears to be the theory upon which many of the cases holding trade boycotts legal though involving secondary boycotts,⁹² have proceeded. Thus in *Bohn Manufacturing Co. v. Hollis*,⁹³ where such a trade boycott was held legal, the court said: "But this involved no element of coercion or intimidation, in the legal

84. 125 Wash 273, 216 P 358, 32 ALR 767 (1923)

85. See section 122, *supra*

86. See *Goldfinger v. Feintuch*, 276 NY 281, 11 NE(2d) 910, 116 ALR 477 (1938). See section 123, *supra*

87. See section 123, *supra*

88. Rest., Torts (1939) secs. 798-801

89. See section 123, *supra*.

90. Rest., Torts (1939) section 801 Illustration 2.

91. Rest., Torts (1939) section 799 (c/f section 808).

92. See section 144, *supra*.

93. 54 Minn 223, 55 NW 1119 (1893).

sense of those terms. . . . Nor was any coercion proposed to be brought to bear on the members of the association, to prevent them from trading with the plaintiff. After they received the notices, they would be at entire liberty to trade with plaintiff, or not, as they saw fit. By the provisions of the by-laws, if they traded with the plaintiff, they were liable to be 'expelled'; but this simply meant to cease to be members. It was wholly a matter of their own free choice, which they preferred, to trade with the plaintiff, or to continue members of the association." So also in *Cote v. Murphy*,⁸⁴ where an employers' association, engaged in resisting a union's demand for higher wages and a strike called pursuant to such demand, induced lumber dealers to refuse to sell lumber to those who, whether members of the association or not, yielded to the strikers' demands. The plaintiff, unable to secure sufficient lumber because of the inducement, sued the association, alleging that the lumber dealers had refused to sell to him because the association had threatened them with reprisal if they sold to the plaintiff. The court held for the defendants, saying that even if the facts alleged by the plaintiff were true, no illegal boycott was thereby shown: ". . . to say, and even that is inferential from the correspondence, that if they continued to sell to plaintiff the members of the association would not buy from them, is not a threat. It does not interfere with the dealer's free choice; it may have prompted him to a somewhat sordid calculation; he may have considered which custom was most profitable, and have acted accordingly, but this was not such coercion and threats as constituted the acts of the combination unlawful."⁸⁵ The view generally entertained, however, is to the contrary. The notion of coercion of third parties does not permit of the analogy of false imprisonment. The right to a free and open mar-

84. 159 Pa 420, 28 A 190 (1894)
Contra Carlson v. Carpenter Contractors' Assn. 305 Ill 331, 137 NE 222 (1922)

85. See also *Cohn & Roth Electric Co. v. Bricklayers Union*, 92 Conn

161, 101 A 659, 6 ALR 887 (1917);
Parkinson Co v Building Trades Council, 154 Cal 581, 98 P 1027, 21 LRA(NS) 550, 16 Ann Cas 1165 (1908).

ket is a right to freedom in all directions, and the wrong done is the limiting of that freedom in any direction. Upon the question of damages, of course, the extent of interference and the consequent inability of the plaintiff to carry on his business or employment would be important, but upon the issue of substantive rights and the resulting availability, for example, of injunctive relief, the length or breadth of the coercion is of little importance.

Section 151. Legality of Boycott as Depending upon Character of the Notification, whether Persuasive or Coercive.

The distinction heretofore considered between the primary and the secondary boycott has been seen to revolve about the nature of the activity brought to bear upon third parties. The employment of persuasion has been seen to constitute a primary boycott. Should the boycotters go one step further, however, and threaten to or actually coerce, boycott or intimidate the buyers, sellers or employees of the person involved in the primary dispute, for their failure or refusal to cooperate with the boycotters, then the situation, as has been seen, is now generally considered to be a secondary and not a primary boycott. The question naturally presented by the distinction thus drawn is: when does a given notification to the allegedly unfair employer's buyers, sellers or employees constitute propaganda merely persuasive in nature, and when, on the other hand, does the notification portend threat of reprisal in the event of non-cooperation? No generalization can, as yet, be made. It has been held, for example, that a notification to a picketed employer's customers that the employer was engaged in a labor dispute and that the people notified should "govern themselves accordingly" constituted an implied threat that the customers would likewise be picketed for non-cooperation, and was hence enjoined as an illegal secondary boycott.⁹⁶ It has also been held⁹⁷ that use of the terms "watch these

⁹⁶ *Perry Truck Lines v. International Brotherhood*, 1 CCH Lab Cas 1292 (Colorado 1939).

⁹⁷ *United States Gypsum Co. v. Healop*, 39 F(2d) 228 (DC ND Ia 1930).

materials" and "continue to watch these materials" as slogans circulated among the trade by a union attempting to unionize the plaintiff is intimidating to the trade and will be enjoined, the court saying: "The pressure was to be brought by publishing these circulars far and wide, bringing them to the attention of local union labor leaders with the expectation that those organizations and individuals would bring them to the attention of the dealers, customers of the plaintiff, and of the workmen on jobs that used plaintiff's material, and thus intimidate dealers and induce them to refrain from using plaintiff's materials." In *Crouch v. Central Labor Council*,⁹⁸ it appeared that a young lady walked to and fro in front of the plaintiff's restaurant which was involved in a labor dispute, exhibiting an issue of the *Oregon Labor Press* on which was printed in large letters the words "Crouch employees work 7 day week. Culinary unions are appealing to public to rebuke practices. Low wages and no day of rest marks employment policy of Crouch's places." The court said that "if this conduct on the part of defendants was not intended to intimidate plaintiff and his employees, then there was no purpose at all in that conduct." On the other hand, it has been held that pickets who occasionally shouted "do not cross the picket line" did not thereby intimidate customers of the boycotted employer, so as to transform the activity into a secondary boycott.⁹⁹ It has been indicated that a labor union may be said to have coerced a third party to a labor dispute where, although no threats were used, the party coerced knew of the pressure which should be exerted against him if he refused to cooperate.¹ The notion that the mere force of numbers is sufficient to transform any acts of persuasion into attitudes of intimidation undoubtedly plays an important, if probably as yet an unascertainable, part in the judicial decision. As stated in *Chapin on Torts*: "Suppose half a dozen men stop a coach, and one of them politely asks the passengers to hand over their valuables, thoughtfully

98. 134 Or 612, 293 P 729, 83 ALR (2d) 1 (Mass 1939).
193 (1930).

1. *R an W Hat Shop v. Scully*, 98

99. *Simon v. Schwachman*, 18 NE Conn 1, 118 A 55 (1922).

adding, 'but you need not do so unless you wish.' Would the courtesy displayed prevent the transaction from being considered robbery." ²

Section 152. Use of the Term "Unfair."

In connection with the use of the term "unfair," the courts are sharply divided,³ but the present trend, if any generality is possible, seems to be in the direction of holding that to banner a person as "unfair" is not thereby to intimidate third parties who continue nevertheless to have business

2. Chapin on Torts (1917), p 441

3. Holding that use of the term "unfair" does not portend any threat *United Chain Theaters v. Philadelphia M P Op* (1931) 189 (DC ED Pa 1931). *Cinderella Theatre Co. v. Sign Writers Local U 6 F Supp* 164 830 (DCD Mich 1934). *United States Gypsum Co v Heslop* 39 F(2d) 228 (DC ND Ia 1930). *Phillip Henric Co v Alexander*, 198 Ill App 568 (1916). *Dehan v Hotel Employees* 159 S 637 (La 1935). *My Maryland Lodge v Adt*, 100 Md 218 59 A 721, 62 LRA 752 (1905). *Gray v Building Trades Council*, 91 Minn 171, 97 NW 663, 63 LRA 753, 103 Am St Rep 477 (1903). *Steffes v Motion Picture Mach Operators Union*, 136 Minn 200, 161 NW 524 (1917); *Lindsey v Montana Fed of Labor*, 37 Mont 264, 196 P 127 (1908). *Iverson v Dulno* 44 Mont 570 119 P 219 (1911). *Link & Son v. Butchers' Union* 84 N1 Eq 638, 95 A 182 (1915); *Simsheimer v United Garment W U* 77 Hun 215, 28 NYS 321 (1894); *Mills v United States Printing Co* 99 AD 605, 91 NYS 185 (1904). *People v Radt*, 15 NY Crim 174, 71 NYS 846 (1900). *Cohen v. United Garment Workers*, 35 Misc 748, 72 NYS 341 (1901). *Foster v. Retail Clerks Protective Ass'n*, 30 Misc 48, 78 NYS 860 (1902); *Seubert v. Reif*, 98 Misc 402,

164 NYS 522 (1917). *Heitkemper v Hoffman*, 99 Misc 543, 161 NYS 533 (1917). *Public Baking Co v Stern*, 127 Misc 229, 215 NYS 537 (1926). *Butterick Pub. Co v Typographical Union*, 50 Misc 1, 100 NYS 292 (1906). *Clark Lunch Co v Cleveland Waiters, etc Local*, 22 Ohio App 265 154 NE 362 (1926). *Stoner v. Robert* 43 Wash L Rep 437 (Sup Ct DC 1915). *Zaat v Building Trades Council*, 172 Wash 445, 20 P(2d) 549 (1933). See also *State v VanPelt*, 136 NC 633, 49 SE 177, 68 LRA 760, 1 Ann Cas 405 (1904).

Holding that a threat is thereby portended *Gompers v Buck's Stove and Range Co* 221 US 418, 31 S Ct 492 55 L Ed 797, 34 LRA(NS) 874 (1911). *Seattle Brewing & Malting Co. v Hansen*, 144 F 1011 (CCA ND Cal 1905). *United States Gypsum Co v Heslop*, 39 F(2d) 228 (DC ND Iowa CD 1930). *Martin v Francke*, 227 Mass 272, 116 NE 404 (1917). *Davis v McGuigan*, 36 Pa D & C (1939). See also *A T Stearns Lumbr Co v Howlett*, 200 Mass 45, 157 NE 82, 52 ALR 1122 (1927).

Holding that the question is one of fact to be decided in the light of the circumstances of the particular case. *Campbell v Motion Picture Machine Operators Union*, 151 Minn 220, 186 NW 781, 27 ALR 631 (1922).

dealings with the person involved in the primary boycott. Indeed, the cases are holding in increasing numbers that use of the term "unfair" in labor disputes cases involves merely the expression of opinion in connection with the employer's labor policy.⁴ As stated in *Thompson v. Delicaten Workers Union*,⁵ "Clearly the defendant is guilty of no coercion of persons who may wish to patronize the complainant. And I think the placards and handbills are free of material misrepresentation. They charge that the employer is *unfair* to the union. The word which I have emphasized misleads no one; it is recognized generally as a characterization of an employer who refuses to conduct his business in the manner desired by the union. It is notice of a dispute."

However, there are decisions which hold that labor has the right to use the term "unfair" in connection with an employer's action considered detrimental to the union, only where the employer is indeed "unfair" in the position which he takes, and that it is a question of law for the court to determine whether, in the given case, the employer may be said to be "unfair."⁶ Moreover, any feeling of certainty which labor may have in connection with the present law governing use of the word "unfair" must be qualified by the language of the United States Supreme Court in *Gompers v. Bucks Stove & Range Co.*⁷ The court there said: "The agreement to act in concert when the signal is published, gives the words 'unfair,' 'we don't patronize,' or similar expressions, a force not inherent in the words themselves, and therefore exceeding any possible right of free speech which a single individual might have."

4. "The term 'unfair' as used by organized labor has come to have a meaning well understood. It means that the person so designated is unfriendly to organized labor or that he refuses to recognize its rules and regulations. It charges no moral shortcoming and no want of business capacity or integrity." *Steffes v. Motion Picture Mach. Op. U.* 136 Minn 200, 161 NW 524 (1917).

5. 8 A(2d) 133 (NJ Eq 1939)

6. See *Roraback v. Motion Picture Operators Union*, 140 Minn 481, 168 NW 766, 3 ALR 1290 (1918), rehearing den. 140 Minn 468, 169 NW 529, 3 ALR 1294 (1918), *Hughes v. Kansas City M.P.M.O.U.* 282 Mo 304 221 SW 95 (1920).

7. 221 US 418, 31 S Ct 492, 55 L Ed 797, 34 LRA(NS) 874 (1911).

Section 153. Use of the Term "Scab."

In several cases, use of the term "scab" has been enjoined or has been held to be possessed of an ingredient of intimidation.⁸ In *Evening Times Printing & Pub. Co. v. American Newspaper Guild*,⁹ the employment of a sound truck from whose loud speaker emanated the word "scab" as concerned the employer involved in the dispute, was enjoined upon the general ground that it was a word which had "opprobrious significance."

Some courts, however, belittle both the extent of opprobrium inherent in the term, and the intimidating character of the term.¹⁰

8. See *United States v. Tahaferro*, 290 F 906 (CCA 4, 1923); *Michaels v. Hillman*, 111 Misc 284, 181 NYS 165 (1920). See also *Crane & Co. v. Snowden*, 112 Kan 217 (1922); *State v. Christie*, 97 Vt 461, 123 A 849, 34 ALR 577 (1924).

9. 124 NJ Eq 71, 199 A 598 (1938).

10. See *Cohen v. United States*, 295 F 633 (CCA 6, 1924), *Illinois Malleable Iron Co. v. Michalek*, 279 Ill 221, 116 NE 714 (1917); *Wood Mowing Machine Co. v. Toohy*, 144 Misc 185, 186 NYS 95 (1921); *People v. Radt*, 71 NYS 846 (1900).

PART IV

COLLECTIVE BARGAINING AGREEMENTS

CHAPTER TEN

LEGAL NATURE, CONSTRUCTION AND EFFECT OF COLLECTIVE BARGAINING AGREEMENTS

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§ 154 LABOR DISPUTES AND COLLECTIVE BARGAINING

Section 154. Definition and General Nature.

The collective bargaining agreement has been variously interpreted, but its essential nature is the subject of general understanding. It may be broadly defined as an agreement between a single employer or an association of employers on the one hand and a labor union upon the other, which regulates the terms and conditions of employment.¹ "Such agreement may be a brief statement of hours of labor and wages, or, on the other hand, it may take the form of a book . . . or often an exhaustive pamphlet regulating, in the greatest minuteness, every condition under which labor is to be performed, and touching upon such subjects as strikes, lockouts, walkouts, seniority, apprentices, shop conditions, safety devices and group insurance."² The term "collective" as applied to the collective bargaining agreement will be seen to reflect the plurality not of the employers who may be parties thereto, but of the employees therein involved. Again, the term "collective bargaining" is reserved to mean bargaining between an employer or group of employers, and a bona fide labor union. Bargaining which involves a company dominated union is assumed to be merely a disguised form of individual bargaining. The collective bargaining agreement bears in its many provisions the imprints of decades of activity contending for labor equality through recognition of the notions underlying collective negotiation. Indeed, in the collective bargaining agreement is to be found a culminating purpose of labor activity.

Section 155. Novelty of the Legal Problems Involved.

Any adequate study of the collective bargaining agree-

1. See, for other definitions of the collective bargaining agreement, *Shelley v. Portland Tug & Barge Co* 158 Or 377, 76 P(2d) 477 (1938), *Brisbin v. N. E. L. Oliver Lodge*, 279 NW 277 (Nebraska, 1938). The subject considered in this chapter is usually considered under the term "collective labor agreements" but the

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words "collective bargaining agreement" are preferred in this work because the process of collective bargaining is thereby more clearly set forth.

2. *Rentschler v. Mo. Pac. R. R. Co* 126 Neb 493, 253 NW 694, 95 ALR 1 (1934).

ment must be prefaced with two characteristics of this branch of our law as presently constituted. First, the newness of it all. In the present state of the law governing the collective bargaining agreement is most clearly reflected the infant status of American labor law. In 1925 a writer upon the subject could say: "In view of this strategic importance of collective labor agreements, it is somewhat surprising to discover that their legal nature has never been carefully considered or precisely defined in an American court decision."³ The recency of this legal development may be attributed largely to (1) the comparatively recent growth and large scale development of the labor movement; (2) the fact that labor preferred, until fairly recently, to rely on its economic strength to enforce its agreements, instead of resorting to the courts; (3) the general illegality until comparatively recent times, of labor activity carried on for collective bargaining and the closed shop, as distinguished from like activity carried on for immediate purposes, as for higher wages or less hours of employment⁴

Second and perhaps consequentially, the present confusion to which the collective bargaining agreement has been subjected at the hands of the common law. The common law has, to be sure, contended in times past with unaccustomed problems. But it has generally recognized the necessity for the introduction into the law of equally new and unaccustomed tools with which to solve newly arising interests arguing for legal recognition. We would never, for example, have been equal to the task of building up a law of negotiable instruments if we had been unwilling to qualify the common law to the extent of receiving the law merchant into its rules and principles. Similarly, we seem to be in need of a new Statute of Westminster II to impel

3. Fuchs, *Collective Labor Agreements in American Law* (1925) 10 *St. Louis L Rev* 1, 2

4. Boycotts have been held illegal if carried on to induce the adoption of a system of collective bargaining, such boycotts being considered unrelated to the securing of higher

wages, less hours or other more beneficial conditions of employment. *United Shoe Machinery Corp v. Fitzgerald*, 237 Mass 537, 130 NE 86, 20 ALR 1508 (1921); *Heitkemper v. Central Labor Council*, 99 Or 1, 192 P 765 (1920).

the general acceptance of the point that new conceptions are necessary to meet the surge of new problems which have followed collective bargaining and the development of the collective bargaining agreement. As has been observed, "Such limitations as the courts have placed upon the collective functioning of collective agreements seem not the result of economic prepossessions, but rather of blunders committed by judges within the grip of concepts derived from the law of private contracts, which, when carried indiscriminately into a field so functionally different, become cramping abstractions."⁵

Subsequent sections dealing with collective bargaining agreements consequently take up a twofold task: first, to state the law which has developed in connection with such agreements; second, to unfold the novelty of the problems raised by these agreements, so as thereby to lay the foundation for a discussion of the means whereby the law governing collective bargaining agreements may reflect more effective, more realistically appraised legal doctrine.

Section 156. How Questions Involving Validity and Scope of Collective Bargaining Agreements Are Raised.

The validity, enforceability and interpretation of collective bargaining agreements have been made the subject of litigation in not merely one or a few, but many different types of controversies. The usual case involves a suit by an individual employee to recover pursuant to the terms of the agreement, or to assert seniority rights thereby guaranteed. But the problem is raised in other ways, as through suit by the labor organization, an employer or an employers' association for specific performance, or damages, or enforcement of an arbitration clause contained in the agreement. Sometimes it is sought to enjoin a strike, picketing or a boycott called in alleged violation of the agreement, while at other times the labor organization is the plaintiff seeking to enjoin a lockout in breach of the agreement or a failure to hire union and not non-union employees, or to restrain

⁵ Note, *The Present Status of Collective Bargaining Agreements* (1938) 51 Harv L Rev 520, 533.

a runaway shop. The validity of collective bargaining agreements is also tested in proceedings designed to destroy the legality of the agreement, as where it is one to secure a closed shop, or to regulate an entire industry by prescribing rules governing competition.

Section 157. View That Agreement Should Be Binding Only in Morals.

The opinion was at one time entertained in some quarters that the collective bargaining agreement ought to impose no legal duty upon the parties, but rather a mere moral obligation to live up to its terms.⁶ Such an opinion may be the reflection of a desire to recognize their binding nature, in which case it is simply a way of saying that collective bargaining agreements ought to be binding and that the law might well look to means of enforcing them in the light of the difficulties standing in the way of their enforcement.⁷ The opinion that collective bargaining agreements should be morally enforceable has, however, found its main source in advocacy that the law ought not to meddle with such agreements; that the parties should be left to adjust such matters as might arise with the guidance of morals and conscience.⁸ In this respect, the opinion reflects a misapprehension of the manner in which industrial disputes

⁶ See Commons and Andrews, *Principles of Labor Legislation* (1920) pp 118-120, Reprint of the report of the Conference in the Eight Annual Report of the Secretary of Labor, p. 259; Majority Report of the Federal Labor Commission on Labor (1934) (Fifth and Sixth Annual Report, p. 461); *Report of the United States Commission on Industrial Relations* (1946) (Annual Report and Testimony, vol. 1, p. 120).

⁷ See Fuchs, *Collective Labor Agreements in American Law* (1925), 10 St Louis L Rev 1, 8-12. See also *Yazoo, etc. R. Co. v. Yazoo*, 161 Miss 4, 133 S 669 (1931). Although only a few years ago the courts were holding that an indi-

vidual member of a labor union could not maintain an action for the breach of an agreement between an employer and the Union of which the plaintiff was a member in respect to wages and other rights fixed in the contract, these rulings have been left in the rear in the advancement of the law on this general subject and the holdings now are that these agreements are primarily for the individual benefit of the members of the organization, and that the rights secured by these contracts are the individual rights of the individual members of the union, and may be enforced directly by the individual.

⁸ See note 1, supra, p. 150.

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are settled, and in the like manner in which, sometimes under pain of damages, injunctions and specific performance decrees, such agreements are kept. One needs but to recall the cases under the National Labor Relations Act wherein employers resisted the reducing of collective bargaining agreements to signed writing though agreements had theretofore been arrived at,⁹ cases wherein labor has been obliged to enjoin the violation of a collective bargaining agreement, or to recover damages for the employer's breach thereof,¹⁰ and cases, on the other side of the controversy, wherein strikes or picketing by unions in breach of collective bargaining agreements have had to be enjoined,¹¹ to realize how ineffective would be a moral sanction. Few who are close to the subject of industrial disputes will be so bold or naive as to believe that men will always stand by their agreements in times of stress without the knowledge that

9. The Circuit Court of Appeals for the Seventh Circuit has ruled that the National Labor Relations Act does not require an employer to enter into a signed written agreement with the Union (*Inland Steel Co v NLRB*, 109 F(2d) 9 [CCA 7, 1940]) but the contrary has been held by the Second Circuit (*Art Metals Construction Co v NLRB*, 110 F(2d) 148 [CCA 2, 1939]) and by the Fourth, Sixth, Ninth and Tenth Circuits. *NLRB v Highland Park Mfg Co* 110 F(2d) 632 (CCA 4, 1940), *H v J Heinz Co v NLRB*, 110 F(2d) 843 [CCA 6, 1940], cert. granted 310 US 621, 60 S Ct 1102, 84 L ed 1394 (1940), *NLRB v. Sunshine Mining Co* 110 F(2d) 780 (CCA 9, 1940), *Continental Oil Co v. NLRB*, 113 F(2d) 473 (CCA 10, 1940). The United States Supreme Court has not yet passed on the question. See section 331, *infra*, for a more extended discussion of the law upon the subject. See also Lieberman, *The Collective Labor Agreement* (NY 1940), p 20. "Some employers attempt to avoid genuine bargaining by a

refusal to enter into written agreements with the union. Such employers prefer to give lip service to the Act, but do not want to assume responsibilities in writing. They go back to the days when the labor agreement was interpreted merely as a gentlemen's agreement. They purchase the tactics as the Industrial Work of the World with a reverse principle. The I W W would not sign an agreement with employers because they would not compromise with capital. The 'die hard' employer will not sign an agreement with the Union because he will not compromise with labor." See also *Dehinsky v. Blue Dale Dress Co* 162 Misc 177, 292 NYS 818 (1936).

10. See *supra*, section 169, *infra*. See also cases, *supra*, section 169, *infra*, involving attempts by employers to evade the obligations of a collective bargaining by disbanding one corporation and forming another one, contending that the new corporation is not bound by the agreement.

11. See section 163, *infra*.

the sanctions of law may be called upon to prod recalcitrants.

- Foreign treatment of the collective bargaining agreement varies in the extent of recognition, but with the exception of England, where the agreement is not given legal effect at all,¹² the law intervenes in some way or other to enforce the terms of the agreement. In Denmark, Finland, Italy and Queensland, violation of the terms of a collective bargaining agreement is declared to constitute a crime, and in some countries individual agreements contrary to the terms of a collective bargaining agreement are void.¹³ Likewise in France and Sweden, collective bargaining agreements are given legal effect.¹⁴

Note should be made of an argument sometimes heard, that collective bargaining agreements should not be legally enforceable contracts because of the possibility that the wages therein provided for may become unfair to workingmen through a rise in the cost of living during the period of the agreement. There are, to be sure, several instances wherein strikes have been called in breach of collective bargaining agreements because the workers bound by the agreements found themselves receiving much less in the form of real wages than was contemplated at the time the agreement was signed. The nationwide bituminous coal

¹² Trade Union Act 34 and 35 Vict. c. 31, sec. 4 (1871); 39 & 40 Vict. c. 22, sec. 16 (1876). *Holland v. London Soc. of Compositors*, 40 TLR 440 (1924); *Young v. Canadian Northern Ry. Co.* [1931] AC 83. "It (collective bargaining agreement) appears to their Lordships to be intended merely to operate as an agreement between a body of employers and a labor organization by which the employers undertake that as regards their workmen, certain rules beneficial to the workmen will be observed. . . . If an employer refused to observe the rules, the effective sequel would be, not an action by any employee, not even an

action by Division No 4 (The Union) against the employer for specific performance or damages, but the calling of a strike until the grievance was remedied." *Young v. Canadian Northern Ry. Co.* (supra). But the agreement establishes a usage which becomes part of individual contracts of employment. 1 Webb, *Industrial Democracy* (1920), 178, 437.

¹³ 1 Freedom of Association 90; Rice, *Collective Labor Agreements in American Law* (1931), 44 Harv L Rev 572, 576.

¹⁴ Rice, *Collective Labor Agreements in American Law* (1931), 44 Harv L Rev 572, 578, 580.

miners' strike of 1919, for example, was a strike called in breach of agreement and in protest against continuation of a wage scale which had become oppressive in the light of the increased cost of living following the World War.¹⁵ But the argument has much less present validity than it ever had. In the first place, labor's resort to the injunction as a means of enforcing the terms of collective bargaining agreements has indicated to workingmen some of the advantages of legal validity of the agreement. In the second place, extensive use of short term collective bargaining agreements or long term agreements containing provisions for periodic adjustment of wage scales have obviated much of the substance which was the basis for the argument.

Section 158. Legal Objections to Validity and Enforceability.

Objections to the validity and enforceability of collective bargaining agreements have emanated from two main sources. The first has been found in the organic law of contracts and equity, and more particularly, (1) in the requirement of consideration; (2) in the rule that agreements, to be valid, must reflect the absence of duress, and (3) in the principle that equity will not enforce agreements where no mutuality of remedy exists. The second has originated in ideas of public policy, and more particularly the principle that contracts in restraint of trade are unenforceable.

Two miscellaneous grounds of objection need to be noted, which, however, have not found support in many cases. The first is that expressed in *Burnetta v. Marceline Coal Co.*¹⁶ where the court said: "The miners' union is not an organization for the purpose of conducting any business enterprise, but is purely one for the protection of labor against the unjust exactions of capital. The members of the union do not labor in coal mines for the organization, but each member works for himself, and whatever compensation he receives is for the benefit of himself and his family. That

15. See Witte, *The Government in Labor Disputes* (1932), p. 249.

16. 180 Mo. 241, 79 SW 136 (1904).

the miners' union, as an organization, cannot make a contract for its individual members in respect to the performance of work, and the payment for it, in our opinion, is too clear for discussion."¹⁷ The second is that a labor union, being but an aggregate of persons and not a legal entity, must be deemed to have acted on behalf of its members in negotiating the so-called collective bargaining agreement, and consequently that the agreement is in reality the individual employment agreement of the members of the labor union.¹⁸

Separate consideration will be given to each of these lines of main objections. First to be taken up (sections 160-162) will be the difficulties encountered by the rules and principles established by the organic law of contracts and equity. Sections 170 to 176 will discuss collective bargaining agreements in connection with public policy assertions.

Section 159. View That Agreement Creates a Usage.

Impelled by some or all of the objections set forth in the preceding section, the view has developed that collective bargaining agreements are simply usages. The view that collective bargaining agreements create or establish a usage is to give very little, if any, legal consequences to the agreement. Nevertheless the view has been taken in a number of cases.¹⁹ Under it the agreement itself creates no binding

17. See also the following case containing language to like effect: *Hudson v. Cincinnati etc. R. Co.*, 152 Ky 711, 154 SW 47, 45 LRA(NS) 184, Ann Cas 1915B, 98 (1913).

18. *Barnes v. Berry*, 169 F 225, 94 CCA 501 (CCA 6, 1909); *Wilson v. Airline Coal Co.* 215 Iowa 855, 240 NW 753 (1933). See also *O'Jay Spread Co. v. Hicks*, 185 Ga 507, 195 SE 564 (1938).

19. *United States Daily Corp. v. Nichols*, 32 F(2d) 834 (CA DC 1929); *Yazoo etc. R. Co. v. Webb*, 64 F(2d) 902 (CCA 5, 1933); *Harrison v. Pullman Co.* 68 F(2d) 826 (CCA 8, 1934); *Moody v. Model Window Glass Co.*

145 Ark 197, 224 SW 436 (1920); *Mastell v. Salo*, 140 Ark 408, 215 SW 583 (1919); *Gregg v. Starks*, 188 Ky 834, 224 SW 459 (1920); *Piercy v. Louisville & Nashville Ry Co* 198 Ky 477, 248 SW 1042 (1923); *Hudson v. Cincinnati, etc. R. Co.* 152 Ky 711, 154 SW 47 (1913); *Long v. Baltimore & Ohio Ry.* 155 Md 265, 141 A 504 (1928); *Burnetta v. Marceline Coal Co.* 180 Mo 241, 79 SW 136 (1904); *Rentschler v. Mo. P. R. Co.* 126 Neb 493, 253 NW 694, 95 ALR 1 (1934); *Unkovich v. N. Central R. R.* 117 NJ Eq 20, 173 A 876 (1934); *Keysaw v. Dotson Brewing Co.* 121 AD 58, 100

legal obligation. As stated in *Panhandle & S. F. R. Co. v. Wilson*:²⁰ "The ordinary function of a labor union is to induce employers to establish usages in respect to wages and working conditions which are fair, reasonable and humane, leaving to each of its members to determine for himself whether and for what time he will contract with reference to such usages." The agreement is the measure, however, of the individual employee's rights, provided he can show that he contracted with reference to it. He need not show that he is, or was at the time of the execution of the agreement, a member of the union when the agreement was made, since the usage operates throughout the industry involved in the agreement.²¹ Nor need he show that the employer was a party to the agreement, since the employer's mere knowledge of the usage is sufficient to bring him within its purview.²²

The view here considered will be seen to involve collective bargaining to some extent, but not to result in a collective bargaining agreement. Hamilton's description of "collective bargaining" in the *Encyclopaedia of the Social Sciences*, while imperfectly stating the notion and consequences of collective bargaining as we know it today, is nevertheless an accurate description of the process from the point of view of the usage theory. "The process of collective bargaining," writes Hamilton, "results not in a labor contract, but in a trade agreement. This imposes no obligation upon the employer to offer or upon the laborers to accept work; it guarantees neither to the employers workmen nor to the laborers jobs. It is nothing more than

562 (1907); *Langmade v. Olean Brewing Co.* 137 AD 355, 121 NYS 388 (1910); *Burton v. Oregon Washington R. & Nav. Co.* 148 Or 648, 38 P (2d) 72 (1934); *Cross Mountain Coal Co. v. Ault*, 157 Tenn 461, 9 SW 692 (1928). See also *Order of Railway Conductors v. Jones*, 78 Colo 80, 239 P 882 (1926); *Mosshamer v. Wabash Ry.* 221 Mich 407, 191 NW 210 (1922); *West v. Baltimore & Ohio R. R. Co.* 163 W Va 417, 137 SE 684 (1927).

(1927).

20. 55 SW(2d) 216 (Tex Civ App 1932)

21. *Gregg v. Starks*, 188 Ky 834, 224 SW 469 (1920); *Yazoo etc. R. Co. v. Webb*, 64 F(2d) 902 (CCA 5, 1933); *United States Daily Publishing Corp. v. Nichols*, 32 F(2d) 834 (CA DC 1929).

22. *United States Daily Publishing Corp. v. Nichols*, 32 F(2d) 834 (CA DC 1929).

The question as to whether the employee who claims the benefit of the terms of the agreement contracted with reference to the usage is one of fact,²³ to be decided by judge or jury depending upon the method of trial. In some cases the quantum of evidence required to prove that the individual contract of employment was meant to be governed by the national agreement has been large.²⁴ In other cases, upon the other hand, a broad view is taken of collective bargaining agreements under which the quantity of proof necessary is relatively small.²⁵ Thus, it has been held that knowledge of the specific provisions contained in the agreement need not be shown as a condition to recovery thereunder.²⁶ The increasing favor which collective bargaining agreements have been achieving in the eyes of courts all over the country is probably evidence of the fact that little will hereafter be necessary to be shown to bring an employee within the purview of the agreement. Illustrating this liberal judicial attitude toward collective bargaining agreements is the language of the court in *Yazoo, etc. R. Co. v. Webb*:²⁷ "As a safeguard of social peace [collective bargaining agreement] ought to be construed not narrowly and technically but broadly and so as to accomplish its evident aims and ought on both sides to be kept faithfully and without subterfuge."²⁸

253 NW 694, 25 ALR 1 (1934)

26. Masten v. Soto, 140 Ark 202, 215 SW 584 (1916).

27. 64 F.2d 302 (CCA 5, 1942).
28. See *San Yazoo* etc. R. Co. v. Sideboard, 291 U.S. 138, 54 S. Ct. 100 (1931). The court said: "From the late two hundred years ago, when the England labor union were

Section 160. Requirement of Consideration.

Because, under the terms of collective bargaining agreements in most cases, employees do not obligate themselves to work for the employer nor does the union undertake to furnish men at the employer's request, several cases have held the agreements void because lacking consideration.²⁹ Most courts, however, prompted by the viewpoint that "it is in the interest of good government that labor unions and employers should be afforded . . . reciprocal protection in their lawful contractual undertakings,"³⁰ have found consideration in a variety of circumstances. Thus it has been held that consideration will be found in an implied assumption by the union to enforce the agreement by exerting its powers over its members given to it by the constitution and by-laws of the union, and a further implied undertaking by the union not to do anything inconsistent with the terms of the agreement.³¹ It has also been held that considerations exist in the union's undertaking not to ask for a wage increase during the term of the agreement.³² In *Maisel v. Sigman*³³ the court found consideration in the employees' implied promise to render services under the terms of the agreement. The implication was found from the language of the agreement to the effect that the union contracted "for and in behalf of the said union and for and

held to be criminal conspiracies, on down even to a recent period, the struggles of these unions for full recognition in the law upon a favorable basis has been somewhat arduous and beset with obstacles. The time has at last arrived, however, when, under patriotic and intelligent leadership, their place has become secure in the confidence of the country, and their contracts are no longer construed with hesitancy or strictness, but are accorded the same liberality, and receive the same benefits of the application of the principles of the modern law, bestowed upon other agreements which appertain to the important affairs of life."

29. *Wilson v. Airline Coal Co.* 215 Iowa 855, 246 NW 753 (1933); *Davis v. Davis*, 197 Ind 386, 151 NE 134 (1926); *Berkhammer v. Cleveland & M. Coal Co.* 8 Law & Labor 217 (W Va 1926). See also *Cross Mountain Coal Co. v. Ault*, 157 Tenn 461, 9 SW (2d) 692 (1928).

30. *Ribner v. Rascen Butter & Egg Co.* 135 Misc 616, 238 NYS 132 (1929).

31. *Harper v. Local Union*, 48 SW (2d) 1033 (Tex Civ App 1932).

32. *Gilchrist Co. v. Metal Polishers*, 113 A 320 (NJ 1919).

33. 123 Misc 714, 205 NYS 607 (1924).

in behalf of the members thereof now employed and hereafter to be employed by the employer with the same force and effect as if this agreement had been made between the said employer and the said union and all individual members now or hereafter employed by the said employer."³⁴

The fact that the members of the union had acquiesced in and had complied with terms of a collective bargaining agreement was held in *H. Blum & Co. v. Landau*³⁵ to give the agreement legal validity. In *Johnson v. American Railway Express Co.*,³⁶ promissory estoppel appears to have been held a proper substitute for consideration, the court saying: "no legal objection to the legality or validity of such an agreement has been urged by the employer or occurred to the court. On the contrary, in the present case, it has been signed by the employer, promulgated and acted upon by it; it must be assumed that it was known to the employees and was an inducement to them to enter or continue in the service; the employer would be estopped to deny its binding force." In *Gord v. F. S. Harmon & Co.*,³⁷ the return to work of striking workmen was held a good consideration. Where a collective bargaining agreement provides that none but members of the union in good standing shall be employed by the employer, and that reasons for discharge shall be incompetence, neglect of duty or disobedience, it can reasonably be implied that the union promises that its members who work for the employer shall be competent, obedient and that they shall perform the duties imposed upon them in a proper manner, and hence there is consideration to support the agreement.³⁸

In some cases, the validity of the agreement in connection with the requirement of consideration is assumed, although the nature of the consideration offered by the union is not clearly set forth.³⁹ The rationale of these cases appears

34. *Simers v. Halpern*, 114 NYS 163 (1909). See also *Nederlandsch v. Stevedores & L. Benev. Soc.* 265 F 397 (DC ED La 1920).

35. 23 Ohio App 426, 155 NE 154 (1926).

36. 163 SC 198, 161 SE 473 (1931).

37. 61 P(2d) 1204 (Wash 1936)

37a. *Gates v. Arizona Brewing Co.* 95 P(2d) 49, 48 P 1939).

38. See *Ind. Transfer R. Co. v. Switchmen's Union*, 68 F(2d) 1202 (CCA 8, 1933); *Weber v. Namer*, 41 Cal App 1202, 186 P 1074 (1927), 219

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to be simply that collective bargaining agreements are so socially desirable that it is well to hold them valid.³⁹

Section 161. Duress.

The law has uniformly answered the employer's contention that a given collective bargaining agreement is void because procured through the union's duress, with the statement that only by signing the agreement could the employer obtain the necessary men to work.⁴⁰ There is no reported case of a collective bargaining agreement held void for duress. This is in line with the general disregard by the law of the respective bargaining abilities of parties to an agreement.⁴¹ In *Wasserstein v. Beim*,⁴² the employer en-

Cal 607, 292 P 637 (1930); *Preble v Architectural Iron W. U.* 260 Ill App 435 (1931); *Hoban v. Dempsey*, 217 Mass 166, 104 NE 717, LRA1915A, 1217, Ann Cas 1915C, 810 (1914); *Shinsky v. O'Neil*, 232 Mass 99, 121 NE 790 (1919), *Lovely v. Gill*, 245 Mass 577, 140 NE 285 (1923), *Rentschler v. Mo. P. R. Co.* 126 Neb 493, 253 NW 694, 95 ALR 1 (1934); *American Cloak & Suit Mfrs. Ass'n v. Brooklyn Ladies Garment Mfrs. Ass'n*, 143 Misc 319, 255 NYS 614 (1931); *Ribner v. Rasco Butter & Egg Co.* 135 Misc 616, 238 NYS 132 (1929)

39. See Note, *The Present Status of Collective Labor Agreements* (1938), 51 Harv L Rev 520, 523n; "Even if the promise is offered merely as an inducement, or additional compensation to the employee for continuing in employment and rendering faithful service as well as to secure tranquility in labor relations, it could be held a binding unilateral contract. This is in addition to such consideration as is furnished by the union's promise, express or implied, to refrain from striking during the period of the agreement." c/f *Wilson v. Airline Coal Co.* 215 Iowa 855, 246 NW 753 (1933), where the court

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refused to imply an undertaking by the union not to strike during the term of the agreement

40. *Maisel v. Sigman*, 123 Misc 714, 205 NYS 807 (1924); *Glickman v. Barker Painting Co.* 227 AD 585, 238 NYS 419 (1930), *Wasserstein v. Beim*, 163 Misc 160, 294 NYS 439 (1937).

41. See Williston on Contracts (Rev. Ed.), secs 1608, 1618. See also *Yazoo etc R Co v. Webb*, 64 F(2d) 902 (CCA 5, 1933) c/f cases questioning the validity of yellow-dog contracts as against the right of a labor union to act as though they had never been entered into. *Exchange Bakery v. Rifkin*, 245 NY 260, 157 NE 130 (1927), reargument den., 245 NY 651, 157 NE 895 (1927), *Interborough Rapid Transit Co. v. Lavin*, 247 NY 265, 159 NE 863 (1928); *La France Elec. Const. & Supply Co. v. Int'l Brotherhood*, 108 Ohio St 61, 140 NE 899 (1923). But consider, in this regard, the rule, of which the New York courts have been outstanding proponents, that enterprises run by a single person or by a family may not be picketed (section 121, *supra*) and the rule, announced by a New Jersey court (section 114, *supra*) that picketing of a "small"

tered into a collective bargaining agreement to call off a strike called at the height of his busy season. At the conclusion of the busy season, he indicated his refusal to go on with the agreement, whereupon the union sued to enjoin his threatened breach. The employer took the position that an agreement entered into to settle a strike called under such circumstances was void for duress. The employer also contended that the strike had been called in breach of agreement, but the court found to the contrary. The court held against the employer, saying: "It is clear that a legally called and properly conducted strike does not constitute duress. In the present case, the strike was made effective by the fact that it was called at the height of defendant's busy season. . . . If the strike was legally called and properly conducted, defendants may not thus repudiate an agreement entered into to avoid or settle a strike."

The National Association of Manufacturers has argued for many years that small manufacturers are often at the mercy of labor unions in connection with the provisions of collective bargaining agreements,⁴³ but this disparity of bargaining power is probably being obviated to a large degree by the rise in the organization of employers' associations. In this connection, it is well to note the case of *Plumbing & Heating Contractors v. Merton*,⁴⁴ where the court held void as against the public policy resulting from the provisions of the New York State Labor Relations Act (prototype of the National Act) an agreement between an employers' association and an employer under the terms of which the employer agreed not to bargain with the union except through the association, and not to hire any union member during a strike or lockout without the prior permission of the association. If this case is correctly decided,

business enterprise as distinguished from a "large" business enterprise is illegal.

42. 163 Misc 160, 294 NYS 439 (1937).

43. See, for example, *Why and How the Wagner Act Should Be*

Amended, A Statement of the National Association of Manufacturers before the Committee on Education and Labor of the United States (1940), p. 9.

44. 173 Misc 448, 17 NYS(2d) 828 (1940).

it reveals the present uncertainty of the status of employers' associations, and opens up knotty problems of bargaining power."

Section 162. Requirement of Mutuality of Remedy.

Equity's requirement that its mandates be mutually available to the parties to an agreement as a condition to equity's intervention, while subjected to changing interpretations, is as old as equity itself. Equity has always required "assurance that the decree, if rendered, will operate without injustice or oppression either to the plaintiff or defendant."⁴⁶ According to one view, the requirement of mutuality means that the contract, "to be specifically enforced by the court, must, as a general rule, be mutual,—that is to say, such that it might at the time it was entered into, have been enforced by either of the parties against the other of them."⁴⁷ But the view presently more generally entertained is that the mutuality rule is satisfied

45. *c/f* American Cloak & Suit Mfrs. Ass'n, Inc. v. Brooklyn Ladies Garment Mfrs. Ass'n, Inc. 143 Misc 319, 255 NYS 614 (1931), where the court upheld the validity of the bargain of two employers' associations under the terms of which, among other things, the plaintiff agreed to act as the defendant's representative in bargaining with the union. Said the court: "In the cloak and suit industry we have no giant corporations like those in the steel and motor fields. The individual employer is quite powerless to bargain on his own terms with a powerful labor organization; nor would the labor union itself find it desirable to deal in detail with every small shop, preferring, I venture to say, to deal with an aggregation which had the same disciplinary power over its members as the labor organization has over its own." See also *Sainer v. Affiliated Dress Manufacturers*, 168 Misc 312, 5 NYS(2d) 855 (1938): 490

"Obviously, in an industry comprised of small units of employers effective collective agreements can be obtained only if the trade union deals with the employers through an association. This method of dealing has the advantage of avoiding a multiplicity of negotiations at every step and enabling a better enforcement of, and respect for, the very collective agreement not alone by the union, but through the discipline which the association exercises upon the individual members"

46. *Epstein v. Gluckin*, 233 NY 490, 135 NE 861 (1922). "Mutuality of performance is a doctrine of equity for the protection of defendants by insuring to them when performance is exacted of them that they get the counter-performance due them." Williston on Contracts (Rev. Ed.) Sec. 1450.

47. *Fry, Specific Performance* (6 ed.), sec. 460.

by the existence of mutuality at the time of application for equity's intervention, even though at the time of the making of the contract no mutuality was possible.⁴⁸ In connection with employment agreements, and hence collective bargaining agreements, equitable enforcement has been denied because (1) as to the employee, a decree enforcing the obligation to work is impossible in the light of the maxim against enforcing involuntary servitudes, and (2) as to both employer and employee, the necessity of supervising the performance of the contract and the character of that performance makes enforcement too complicated if not impossible. It is also mentioned that equity deals only with those employment contracts having to do with unique or extraordinary services.⁴⁹

For these reasons, employees have in a number of cases been denied specific performance of collective bargaining agreements.⁵⁰ So also, an employer has been denied equitable relief against a strike called in violation of a collective bargaining agreement.⁵¹ The sanction which the United States Supreme Court⁵² has given to the reinstatement provision contained in the National Labor Relations Act,⁵³ under which employees discharged for union activity, membership or sympathy are entitled to reinstatement with or without back pay, has pointedly indicated the non-traditional character of the personal services involved in the process of collective bargaining. The generally impersonal character of the employment relationship involved in collective bargaining agreements has come to impress the

48. Ames, *Mutuality in Specific Performance* (1903), 3 Col L Rev 1; Ames, *Lectures on Legal History*, 370; Williston on Contracts (Rev ed), sec. 1440; Rest., Contracts, sec. 373.

49. See Williston on Contracts (Rev ed), secs. 1450, 1450A.

50. *Chambers v. Davis*, 128 Miss 613, 91 S 346, 22 ALR 114 (1922); *Beatty v. Chicago, etc.*, R. Co. 49 Wyo 22, 52 P(2d) 404 (1935). See

also *Barzilay v. Lowenthal*, 134 AD 502, 119 NYS 612 (1909).

51. *Lundoff-Bicknell Co. v. Smith*, 24 Ohio App 294, 156 NE 243 (1927). See also *Interborough Rapid Transit Co. v. Green*, 131 Misc 682, 227 NYS 258 (1928).

52. *NLRB v. Jones & Laughlin Steel Co.* 301 US 1, 57 S Ct 615, 81 L Ed 893, 108 ALR 1352 (1937).

53. 49 Stat. 449 (1935), 29 USCA secs. 151-166.

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courts with the need for new legal viewpoints in connection with traditional equitable principles.⁵⁴

Section 163. Collective Bargaining Agreements Are Now Generally Valid and Enforceable.

The overwhelming weight of authority today holds that collective bargaining agreements are valid contracts, enforceable both at law and in equity. The theory that a collective bargaining agreement is not a contract at all but merely establishes a usage (which Professor Rice in 1931 stated to be the "orthodox view of the American law")⁵⁵ still persists, as will be seen from the dates of the cases which still so hold,⁵⁶ but statutes like the Railway Labor Act⁵⁷ and the National Labor Relations Act,⁵⁸ supplemented by a general trend of opinion in favor of collective bargaining, which is reflected in court holdings giving legal effect to such agreements, have definitely given to the collective bargaining agreement a legal, and not simply a moral or usage character. Thus, both unions and employees covered by the agreement are permitted to utilize equity's

54. See *Turner v. Davidson*, 4 SE (2d) 814 (Ga 1939) holding that an employer has no insurable interest in an employee, a filling station attendant, so as to justify a life insurance policy with a disability clause taken out by the employer on the life of the employee, because of the non-skillful character of the employment and the consequent ease of replacement c/f *Neely v. Pigford*, 181 Miss 306, 178 S 913 (1938)

55. Rice, *Collective Labor Agreements in the American Law* (1931), 44 Harv L Rev 572, 582

56. See section 159, *supra*.

57. 48 Stat. 1189 (1934), 45 USCA secs. 153 et seq. See, for a description of the operation of the National Railroad Adjustment Board under the Act, Spencer, *The National Railroad Adjustment Board, Studies in Business Administration*, The School

of Business, Uni of Chicago (1938), Pipin, *Enforcement of Rights under Collective Bargaining Agreements* (1939), 6 Univ of Chi L Rev 650, 661-666. See, also, for a case enforcing the right of employees to engage in unmolested organization for the purpose of collective bargaining under the Act, *Texas & N O. R. Co. v. Brotherhood*, 281 US 548, 50 S Ct 427, 74 L Ed 1034 (1930). In *Wisconsin State Federation of Labor v. Simplex Shos Mfg. Co.* 215 Wis 623, 256 NW 56 (1934), a labor union was permitted to sue for an injunction restraining interference by an employer with the union's right under the Wisconsin State Labor Code to organize for the purpose of collective bargaining.

58. 49 Stat. 449 (1935), 29 USCA secs. 161-165.

mandate to assert rights under such agreements or to enjoin an employer's breach thereof.⁵⁹ A provision for liquidated damages contained in a collective bargaining agreement has been held valid and enforceable,⁶⁰ and in several cases unions have accordingly succeeded in obtaining damages against employers for the breach of the agreement.⁶¹ In other cases, labor unions under collective bargaining agreements with employers have enjoined rival unions from seeking to induce employers to breach the agreements.⁶² Strikes in violation of collective bargaining

59. See *Weber v Nasser*, 81 Cal App 1259, 286 P 1074 (1930), 210 Cal 607, 292 P 637 (1930); *Pearlman v. Millman*, 7 Law and Labor (Mass Super Ct 1925), *Henry v. Century Shoe Co.* 12 Law and Labor 7 (Mass Super Ct 1929), *Mississippi Theatres Corp v Hattiesburg Local Union*, 174 Miss 439, 164 S 887 (1936); *Schlesinger v Quinto*, 201 AD 487, 194 NYS 401 (1922), *Ribner v Rasco Butter, etc. Co* 135 Misc 616, 238 NYS 132 (1929), *Leverantz v. Cleveland Home Brewing Co.* 24 Ohio NP (NS) 193 (1922); *Harper v. Local Union*, 48 SW(2d) 1033 (Tex Civ App 1932). See also *Goldman v Cohen*, 222 AD 631, 227 NYS 311 (1928) and *Dubinsky v Blue Dale Dress Co* 169 Misc 177, 292 NYS 896 (1936), holding enforceable a lockout in violation of agreement. An employer who has himself breached a collective bargaining agreement may not enjoin striking and picketing by the aggrieved union to compel the employer to live up to its terms. *Spivak v. Wankofsky*, 155 Misc 530, 278 NYS 502 (1935). But see *Samuel Hertz Corporation v. Gibbs*, 295 Mass 229, 3 NE(2d) 831 (1936).

60. *Maisel v. Sigman*, 123 Misc 714, 205 NYS 807 (1924). See also *Jacobs v. Cohen*, 183 NY 207, 76 NE 5 (1905). Aliter, where the provision, though purporting to be one for

liquidated damages, is one for a penalty. *Cohen v. Berkman*, 130 Misc 725, 225 NYS 135 (1927). See also *March v. Bricklayers' Union*, 79 Conn 7, 63 A 291, 4 LRA(NS) 1198 (1906); *Carew v. Rutherford*, 106 Mass 1, 8 Am Rep 287 (1870) c/f *Burke v. Fay*, 128 Mo App 690, 107 SW 408 (1908).

61. See *Jacobs v. Cohen*, 183 NY 207, 76 NE 5 (1905), *Maisel v. Sigman*, 123 Misc 714, 205 NYS 807 (1924).

62. *Kinloch Telephone Co. v. Local Union*, 275 F 241 (CCA 8, 1921), cert. den 257 US 602, 42 S Ct 270, 66 L Ed 423 (1922), *Tracy v. Osborne*, 226 Mass 25, 114 NE 959 (1917); *Goyette v. Watson*, 245 Mass 577, 140 NE 285 (1923), *Wolchak v. Wiseman*, 145 Misc 268, 259 NYS 225 (1932); *Fisco Operating Corp v. Kaplan*, 144 Misc 646, 258 NYS 303 (1932); *Bank & Pilot, Inc v. Amalgamated Meat Cutters*, 109 SW(2d) 1083 (Tex Civ App 1937). See also *Wetman Construction Co. v. Knight*. — NW — (Mich 1940). c/f *Haden Employees' Assn. v. Lovett*, 122 SW (2d) 230 (Tex Civ App 1938). See as to the legality of picketing in cases involving jurisdictional disputes, sections 130-133, supra.

In *Christian v. Local 680*, 126 NJ Eq 508, 10 A(2d) 238 (1940), a company union brought suit to enjoin enforcement of a closed shop con-

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agreements are almost uniformly enjoined,⁶³ and this in spite of the rule against the enforcement of involuntary servitude.⁶⁴ Picketing⁶⁵ and boycotting⁶⁶ in breach of a collective bargaining agreement have likewise been enjoined. In *Dubinsky v. Blue Dale Dress Co.*,⁶⁷ where the court found the defendants, employers, guilty of having locked out their employees and thereafter removing their

tract entered into between the defendant A.F.L. union and the employer, subsequent to the time that the plaintiff union had entered into a closed shop contract with the same employer, which was allegedly still in force and effect. It was alleged in the complaint that the A.F.L. union procured the contract by means of fraud and coercion, and that the A.F.L. union no longer represented a majority of the employer's employees. The Court of Errors and Appeals reversed a lower court's denial of the plaintiff's motion for a temporary injunction restraining defendant employer from discharging plaintiff's members, and directing the employer otherwise to maintain the status quo.

63. *Nederlandsch v. Stevedores Union*, 265 F 397 (DC ED La 1920); *Barnes v. Berry*, 156 F 72 (CC SD Ohio WD 1907); *Shop 'N Save v. Retail Food Clerks Union*, — Cal —, — P(2d) — (1940); *Burgess v. Ga. R. Co.* 148 Ga 415, 96 SE 864 (1918); *Preble v. Architectural Iron Work Union*, 280 Ill App 435 (1931); *Christ v. Metal Polishers*, 113 320 (NJ Eq 1919); *Goldman v. Cohen*, 222 AD 631, 227 NYS 31 (1928); *Grassi Contracting Co. v. Bennett*, 174 AD 244, 160 NYS 79 (1916); *Meltzer v. Kaminer* 31 Misc 813, 227 NYS 459 (1927); *Moran v. La-sette*, 221 AD 11, 222 NYS 283 (1927); *McGrath v. Orman*, 221 AD 804, 223 NYS 289 (1927); *McCarthy v. Brotherhood of Painters*, 102 NY LJ 393 (NY Co Sup Ct Aug 17th, 1939). See section 86, *supra*, for a 494

general discussion of the legality of strikes in breach of agreements, whether the agreement be a collective bargaining agreement, a yellow-dog contract, or an individual employment term contract.

" . . . an arbitrator yesterday awarded to a company substantial damages against a union for violation of contract." It was ordered that the union "pay the company \$10,000 for calling a one-day strike on February 24th in the company plants at Webster Avenue, Bronx, and elsewhere in contravention of a uniform contract between the union and the company. The award is final." N.Y. Times, July 22, 1940.

64. See section 30, *supra*, or a statement of the rule against the use of equity to enforce inventory servitudes, and of the case which support the rule.

Shop 'N Save v. Retail Food Clerks Union, — Cal —, — P(2d) — (1940); *Perfect Laundry Co. v. Marsh*, 101 A 774 (NJ Eq 1937). But striking or picketing, though in breach of agreement, has been held to constitute a "labor dispute" under the Norris Act, so as to be unenjoinable in the federal courts. *Wilson & Co. v. Birl*, 27 F Supp 915 (DC ED Pa 1939), *aff'd* 105 F(2d) 948 (CCA 3 1939). See *infra*, section 177.

65. *All-Metal Lighting Fixture Corp. v. Wilson*, 10 Law & Labor 243, 248 (New York, 1928).

67. 102 Misc 177, 292 NYS 898 (1936).

plant to another city in breach of a collective bargaining agreement, the defendants were directed to right their wrong as follows: "It follows that defendants should be directed, so long as they remained in this industry, to comply with the terms of the collective agreement, specifically by putting all the members of plaintiffs' union whom they locked out on October 29 and thereafter back to work, or as many of them as they may have work for, anywhere; by moving back within the agreed area in New York City all the machinery and other effects hitherto removed to Archibald, since they cannot be made to abide by the contract in Pennsylvania. . . . The defendants also should be compelled to account to the plaintiffs by reason of the lockout, and a referee will be appointed to compute the compensatory damages sustained by members of the plaintiff union." Jurisdiction to enter such an inclusive decree was found in the fact that the defendants appeared in the action.⁶⁸

Section 164. Violation of Collective Bargaining Agreement an Unfair Labor Practice.

Under the State Labor Relations Act of Minnesota, strikes in violation of the terms of collective bargaining agreements are declared to be unfair labor practices.⁶⁹ The Wisconsin law provides that any violation by employees of the terms contained in collective bargaining agreements shall constitute an unfair labor practice.⁷⁰ The Minnesota act also declares it to be an unfair labor practice for an employer to lock out his employees in breach of a collective bargaining agreement,⁷¹ while in Wisconsin it is declared an unfair labor practice for an employer to violate in any manner the terms contained in a collective bargaining agreement.⁷² It should be noted, however, that the penalties attached to unfair labor practices under the Wisconsin law

68. See also *Goldstein v. I.L.G.W.U.* 328 Pa 385, 196 A 43 (1938).

69. Minnesota Acts of 1939, chapter 440, section 11 (a).

70. Wisconsin laws of 1939, chap-

ter 57, section 111.06 (2c).

71. Minnesota Acts of 1939, chapter 440, section 12 (a).

72. Wisconsin laws of 1939, chapter 57, section 111.06 (1f).

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differ from those contained in the Minnesota act. The Wisconsin law follows the National Labor Relations Act, providing for administrative enforcement in the form either of cease and desist orders or of orders to reinstate with back pay.⁷³ In Minnesota, enforcement is by direct proceeding in court by the party aggrieved.⁷⁴ There is no provision contained in the Minnesota law for reinstatement of employees with or without back pay.

Section 165. View That Individual Employee Obtains No Rights under the Agreement.

The view that collective bargaining agreements create no rights in individual employees coming within their purview has little authority to support it. In *Kessell v. Great Northern Ry. Co.*⁷⁵ the plaintiff predicated his action for wrongful discharge upon the terms of a collective bargaining agreement entered into between the defendant and the union of which the plaintiff was a member in good standing. The court held that the action was unmaintainable, saying: "The agreement is clearly between the railway company and the brotherhood organization, and constitutes no contract between any member employee and the railway company." The court assumed the contractual nature of the agreement.⁷⁶

73. Wisconsin laws of 1939, chapter 57, section 111.07 (4).

74. Minnesota Acts of 1939, chapter 440, section 14. Violators of the Act are not entitled to any benefits otherwise accorded to such violator under the Act. Section 15. Nor may a violator maintain a suit for an injunction in the state courts "until he shall have in good faith made use of all means available under the laws of the State of Minnesota for the peaceable settlement of the dispute" Section 15.

75. 51 F(2d) 404 (DC WD Wash, 1931).

76. The court quoted from the English case of *Young v. Canadian*
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Northern Ry. Co. [1931] AC 83, where the plaintiff employee's right to recover was denied because, under the English view, collective bargaining agreements are not legal contracts, and give rise to no legal obligations. (See section 157, *supra*, for a statement of the English law.) There is nothing in the case, however, to indicate that such was the view adopted by the court. On the contrary, the court three times referred to the agreement, as between union and employer, as a "contract." See also *Southern R. Co. v. Morris*, 210 Ala 463, 98 S 387 (1923); *Panhandle etc. R. Co. v. Wilson*, 55 SW(2d) 216 (Tex Civ App 1932).

Section 166. View That Individual Employee May Assert Rights under the Agreement.

The great weight of authority holds that individual employees obtain rights, in the absence of a stipulation in the agreement to the contrary, which they can enforce individually. Sometimes employees obtain vindication of their rights through an action for damages by the union.⁷⁷ More often, however, the individual employee sues without record aid of the union, either to obtain damages,⁷⁸ or to secure specific relief,⁷⁹ as where he is discharged in violation of seniority rights provisions contained in the agreement, and seeks reinstatement. Assertion by an individual employee of some right allegedly secured by the terms of a collective bargaining agreement has been permitted under either one of two theories, which it is the purpose of the following two sections to discuss: (1) that the union acts as the employee's agent; (2) that the employee is a third party beneficiary of the agreement.^{79a}

Section 167. View That Union Acts as Employee's Agent.

Several courts have adopted the view that labor unions act as agents for their members in negotiating collective bargaining agreements with employers.⁸⁰ It has been held

77. See *Dubinsky v. Blue Dale Dress Co* 162 Misc 177, 292 NYS 898 (1936); *Barth v. Addie*, 271 NY 31, 2 NE(2d) 34 (1936), rehearing denied 271 NY 615, 3 NE(2d) 211 (1936). But see *O'Jav Spread Co v. Hicks*, 185 Ga 507, 195 SE 564 (1938).

78. *Rentschler v. Missouri Pacific R Co* 126 Neb 493, 253 NW 694, 95 ALR 1 (1934); *San Antonio etc R Co v. Collins*, 61 SW(2d) 84 (Tex Com App 1933).

79. *Gregg v. Stark*, 188 Ky 834, 224 SW 459 (1920); *McGregor v. Louisville etc. R. Co* 244 Ky 696, 51 SW(2d) 953 (1932).

79a. Sometimes courts permit suit by individual employees to assert rights secured by collective bargaining agreements, without indicating

the ground of such permission. See *Gates v. Arizona Brewing Co.* 95 P (2d) 49 (Ariz 1939).

80. *Barnes v. Berry*, 169 F 223 (CCA 6, 1909); *Boucher v. Godfrey*, 119 Conn 622, 178 A 655 (1935); *Gary v. Central of Ga. R Co* 44 Ga App 120, 160 SE 716 (1931); *Pierev v. Louisville etc. R. Co.* 198 Ky 477, 248 SW 1042, 33 ALR 322 (1923); *Aulich v. Craigmyle*, 248 Ky 676, 59 SW(2d) 560 (1933); *Mueller v. Chi & N. W. Ry.* 194 Minn 83, 259 NW 798 (1935); *Hall v. St. Louis-San Francisco R. Co* 224 Mo App 431, 28 SW(2d) 687 (1930); *Meltzer v. Kaminer*, 131 Misc 813, 227 NYS 459 (1927); *Maisel v. Sigman*, 123 Misc 714, 205 NYS 807 (1924); *Christiansen v. Local 680*, 126 N.J. Eq

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under this theory that recovery by an employee depends upon his showing either that he initially authorized the making of the contract or that he subsequently ratified the contract.⁸¹ The agency theory encounters the difficulty of explaining how an employee may become party to the agreement, where he joins the union subsequent to the negotiation thereof. It might be reasoned, however, that he ratifies or at least adopts the agreement by entering into the employ of the employer who negotiated the contract with the union. In *Shelley v. Portland Tug & Barge Co.*⁸² the plaintiff sued to recover overtime and subsistence monies allegedly due under the terms of a collective bargaining agreement. It appeared that while he was in the defendant's employ, the employer entered into a collective bargaining agreement with a labor union under the terms of which the employer promised to pay its employees the monies for the recovery of which the plaintiff sued. At the time of the execution of the agreement the plaintiff was not a member of the union. Only after the plaintiff terminated his employment did he become a member of the union. The court denied the plaintiff's right to recover under the circumstances, holding there was no evidence that the union acted as the plaintiff's agent in negotiating the contract.

Section 168. View That Employees Are Third Party Beneficiaries of the Agreement.

A large number of courts have adopted the view that labor unions act not as agents for employees but rather as

608, 10 A(2d) 168 (1940); *San Antonio etc. R. Co. v. Collins*, 35 SW (2d) 507 (Tex Civ App 1931), 61 SW (2d) 84 (Texas 1933); *West v. Baltimore & Ohio R. Co.* 103 W Va 417, 137 SE 654 (1927).

81. *Gary v. Central of Georgia Ry. Co.* 44 Ga App 120, 160 SE 716 (1931); *West v. Baltimore & Ohio R. Co.* 103 W Va 417, 137 SE 654 (1927). "Under the provisions of

this agreement, we think it was necessary that the plaintiff should remain a member of the organization, in order to abide and comply with the terms and conditions of his employment, and that his resignation constituted a violation of the contract establishing that relation." *Gary v. Central of Georgia Ry. Co.* *supra*.

82. 76 P(2d) 477 (Oregon 1938).
[1 Teller]

principals for the benefit of their members.⁸³ It has been held that a third party may recover as beneficiary under a collective bargaining agreement although he was not a member of the union and could not become a member of the union because he was a negro. The court reasoned that the contract involved in the case permitted a construction in favor of the plaintiff because of a clause contained therein which provided: "Rights contained in this agreement shall be understood to apply for both white and colored employees alike."⁸⁴ Attempts by workmen to recover as third party beneficiaries of contracts entered into by an employer with the government under the short-lived N. I. R. A. met with some holdings in favor of such an action upon the theory that the workman was a primary

83. *Moore v Illinois Cent R Co* 24 F Supp 731 (DC SD Miss 1938); *Grand Int'l Brotherhood v Mills*, 43 Ariz 379, 31 P(2d) 971 (1934); *Dierschow v. W. Suburban Dairies*, 270 Ill App 355 (1934); *Evans v Johnston*, 300 Ill App 78 20 NE(2d) 841 (1939); *Volquardsen v Southern Amusement Co*, 156 So 678 (La App 1934); *Donovan v Travers*, 285 Mass 167, 188 NE 705 (1934); *Yazoo, etc R. Co. v Mitchell*, 161 S 860 (Miss 1935); *Yazoo, etc. R. Co. v Sideboard*, 161 Miss 4, 133 S 669 (1931); *McCoy v. St. Joseph Belt Ry Co*, 220 Mo App 506, 77 SW(2d) 175 (1934); *Hall v St. Louis etc Ry*, 224 Mo App 431, 28 SW(2d) 687 (1930); *Rentschler v. Mo. Pac. Ry Co*, 126 Neb 493, 253 NW 694, 95 ALR 1 (1934); *Gulla v. Barton*, 164 AD 293, 149 NYS 952 (1914); *Blum & Co. v Landau*, 23 Ohio App 426, 155 NE 154 (1926); *Johnson v American Ry. Express Co*, 163 SC 191, 161 SE 473 (1931); *Youmans v. Charleston Ry. Co*, 175 SC 99, 178 SE 671 (1935); *Marshall v. Charleston, etc. Ry. Co*, 164 SC 233, 162 SE 348 (1931); *Beatty v. Chi. etc., R. Co*, 49 Wyo 22, 62 P(2d) 404 (1935). See *Gleason v*

Thomas, 117 W Va 550, 186 SE 304 (1936). See also *Lambert v. Georgia Power Co*, 161 Ga 621, 163 SE 814 (1936) and *Kentucky Fluorspar Co. v. Wolford*, 263 Ky 471, 92 SW(2d) 753 (1936), stating that the parties to a collective bargaining agreement are bound thereby, but failing to indicate the theory under which the parties are bound. See also *Williston on Contracts* (Rev Ed) sec 379: "The fact that there is no adequate remedy for the enforcement of such an agreement between a union and an employer against one another affords no reason in such a case why the beneficiary of such an agreement should not enforce it."

Third party beneficiaries have been permitted to enforce their rights by injunction. *Alabama Water Co. v. Jasper*, 211 Ala 280, 100 S 486 (1924); *Ferris v. American Brewing Co*, 155 Ind 539, 58 NE 701, 52 LRA 305 (1900); *Phez Co. v Salem Fruit Union*, 103 Or 514, 201 P 222, 25 ALR 1090 (1921); *Williston on Contracts* (Rev Ed), sec. 379.

84. *Yazoo, etc. R. Co. v. Sideboard*, 161 Miss 4, 133 S 669 (1931)

party to the contract,⁸⁵ and other holdings against the propriety of maintaining the action, the court saying that the breach of contract was a public wrong which, even if involving damage to the plaintiff, he could not redress because his interest in the transaction was too remote.⁸⁶

A vital distinction between the individual employee's right to recovery under the usage theory and the third party beneficiary theory lies in the fact that the employee need not show, in order to recover according to the terms of the collective bargaining agreement, that he contracted with reference to it. It has accordingly been held that recovery of the wages provided for in a collective bargaining agreement may be had by an employee even though he did not know of the agreement when he rendered the services.⁸⁷ But where he has made an express individual agreement of an independent nature, he cannot, according to *Langmade v. Olean Brewing Co.*,⁸⁸ recover according to the terms of the collective bargaining agreement.⁸⁹

A third party for whose benefit a contract is made has no greater rights than those fixed by the terms of the contract,

85. *Fryns v. Fair Lawn Fur Dressing Co.* 114 NJ Eq 462, 168 A 862 (1933); *Morrison v. Gentler*, 152 Misc 710, 273 NYS 952 (1934). *Mesloh v. Schulte*, 151 Misc 750, 273 NYS 699 (1934); *Canton v. The Palma*, 152 Misc 347, 273 NYS 239 (1934).

86. *Sherman v. Abeles*, 265 NY 383, 193 NE 241, 95 ALR 1384 (1934); *Abramovitz v. Trolman*, 152 Misc 768, 273 NYS 243 (1934). Another ground for denying the propriety of individual suits was the fact that the language contained in the codes was similar to that contained in the Sherman antitrust act which act itself afforded no relief to private parties. See *Progressive Miners v. Peabody*, 7 F Supp 340 (DC ED Ill, 1934); *National Foundry Co. v. Alabama Pipe Line Co.* 7 F Supp 821 (DC ED NY, 1934);

Harper v. Southern Coal & Coke Co., 73 F(2d) 792 (CCA 5, 1934); *Ilary v. United Electric Coal Co* 8 F Supp 655 (DC ED Ill 1934); *Cline v. Consumers Co.-Op. Gas & Oil Co* 152 Misc 653, 274 NYS 362 (1934). See also *Motor Truck Assn v. Dailey*, 8 F Supp. 672 (DCD Mass 1933).

87. *Gulla v. Barton*, 164 AD 203, 149 NYS 952 (1914). See also, in this connection, *Ahlquist v. Alaska-Portland Packers Assn.* 39 F(2d) 348 (CCA 9, 1930).

88. 137 AD 355, 121 NYS 388 (1910). See also *Taylor v. Mathues*, 170 A 309 (Pa Super Ct 1934); *Yazoo etc. R. Co. v. Webb*, 64 F(2d) 902 (CCA 5, 1933).

89. *Contra: Reichert v. Quindazzi*, 6 NYS(2d) 284 (Mun Ct City of New York, 1938); *McNeil v. Hacker*, 21 NYS(2d) 432 (City Court, City of New York, 1940).

and accordingly "it has been almost universally held that if the original parties to the contract reserve by the terms of the contract the right to modify it or abrogate it, such a reservation is valid and enforceable."⁹⁰ A member of a labor union who is employed under a collective bargaining agreement, and who is the beneficiary of the terms thereof, takes subject not only to the provisions of the agreement, but also to the constitution, rules and by-laws of the union, and he has no cause of action against the union if he loses his employment pursuant to a proper resolution adopted by the union. Thus in *O'Keefe v. Local 463, United Assn. of Plumbers*,⁹¹ the plaintiffs were discharged pursuant to a union rule ordering their discharge and their non-reemployment by their former employer for a period of one year. The union rule appeared to have been adopted to combat the practice by employers of paying to their employees less money than that provided for in the collective bargaining agreement. The plaintiffs were held remediless because the union rule was held valid and reasonable under the circumstances, adopted in good faith to meet a serious exigency.

Settled contract law is to the effect that an incidental beneficiary may not sue as third party beneficiary of a contract. The execution of the contract and the fact that it results in a benefit to a third party is not enough to give the third party any rights under the contract. It must further appear that the primary purpose of the contract is to confer a benefit upon the third party seeking enforcement.⁹² In *Acierno v. North Shore Bus Co. Inc.*⁹³ the plaintiffs had formerly been employed by a bus line company

90. *Bergstein v. Popkin*, 202 Wis 625, 632, 233 NW 572, 575 (1930). See *Evans v. Johnston*, 300 Ill App 78, 20 NE(2d) 841 (1939) applying the rule to a collective bargaining agreement. See also *Lockwood v. Chitwood*, 89 P(2d) 951 (Oklahoma, 1939).

91. 277 NY 300, 14 NE(2d) 77, 117 ALR 817 (1938).

92. Williston on Contracts (Rev

Ed), secs 402, 403 Rest. Contracts, sec. 147. But "it is not essential to the creation of a right in a donee beneficiary or in a creditor beneficiary that he be identified when a contract containing the promise is made." Rest., Contracts, sec 139. See also Williston, *op cit*, secs 378, 389.

93 173 Misc 79, 17 NYS(2d) 170 (1939).

which, after having become involved in a labor dispute, was taken over by the defendant. When the defendant took over the franchise of the plaintiffs' former employer, a franchise agreement was entered into with the City of New York under the terms of which the defendant agreed, among other things, as follows: "The Company hereby agrees that it will, consistent with the efficient operation of its omnibuses, hire employees of the Companies which formerly operated the routes herein granted." The defendant had a closed shop contract with a union (also joined as party defendant) which refused membership to the plaintiffs because of alleged strikebreaking activities carried on by them in connection with the labor dispute of their former employer. Plaintiffs contended they had a right to employment as third party beneficiaries of the franchise contract entered into between the defendant bus company and the city. The court, however, held against the plaintiffs, stating that the franchise agreement was not made for their benefit but for the benefit of the city.

Another case indicating the consequences of the rule holding that an incidental beneficiary acquires no rights under and consequently may not sue as a third party beneficiary of a contract is *Associated Flour Haulers and Warehousemen Inc. v. Triborough Transportation Corp., et al.*⁹⁴ It appeared in that case that the plaintiff, an employers' association, had entered into a contract with Local 138 of the International Brotherhood of Teamsters under the terms of which Local 138 undertook, during the term of the contract, to furnish help to the employers who were members of the plaintiff in connection with their business of hauling flour in the City of New York. The charter issued by the International to Local 138 gave it "the sole and exclusive right to haul flour in Greater New York." Locals 202 and 807 of the International were granted the right by their charters to haul commodities "other than flour" in Greater New York. In spite of the limitations contained in their charters, Locals 202 and 807 entered

⁹⁴ 282 NY 173, 26 NE(2d) 7 (1940).

into agreements with employers who were not members of the plaintiff to furnish help at rates of pay less than those contained in the contract between the plaintiff and Local 138. The defendant, Triborough Transportation Corp., an employer not associated with the plaintiff, entered into a contract with Local 202, and because the wages, hours and other conditions of employment were more beneficial to the defendant than the analogous terms and conditions set forth in the contract between the plaintiff and Local 138, the defendant Triborough Transportation Corp. was able to undersell the members of the plaintiff. Plaintiff demanded a decree declaring that Local 138 had the sole and exclusive right to supply labor for the hauling of flour in Greater New York until the expiration of the contracts between plaintiff, its members and Local 138 and that flour hauling by members of Locals 202 and 807 was a violation of the contracts between plaintiff, its members and Local 138. The plaintiff further sought an injunction restraining the defendant, Triborough Transportation Corp., until the said expiration of the aforesaid contracts from further engaging in hauling and delivering of flour in Greater New York. The plaintiff's theory was that it was a third party beneficiary of the implied contract which could be spelled out from the provisions contained in the charters of Locals 138, 202 and 807 and the jurisdiction which the respective locals possessed as a result of the charter provisions. By this implied contract, said the plaintiff, "The defendant, Locals 202 and 807 recognized in Local 138 the exclusive right to supply labor for hauling flour in New York City and that by undertaking to confine their activity within the scope of their own charter they impliedly agreed not to infringe upon the exclusive privilege of Local 138." The court, however, held that the plaintiff's complaint stated no cause of action, upon the ground that, even assuming the existence of the implied contract, the plaintiff was merely an incidental beneficiary thereof and not one for whose benefit the contract was primarily intended.

A significant defect of the third party beneficiary theory is the lack of any ground, under this theory, of holding

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the individual employee liable, since our law does not recognize any obligation to rest upon a third party beneficiary. In practice, however, this lack is not very serious because (1) union discipline in the ordinary case is sufficient to secure compliance on behalf of the employer; (2) the employee's services being usually of a standard character and not extraordinary, the union can generally provide an equally competent substitute; (3) collective bargaining agreements generally retain the at-will nature of the union members' employment.⁹⁵ In a number of cases, courts have held individual employees bound by the terms of a collective bargaining agreement, without clearly indicating the theory under which they were held bound.⁹⁶

Still another point of distinction needs to be noted, between the operation of the agency and the third party beneficiary theory. Under the former, it would seem that little is left to the union by way of direct rights of enforcement, whatever rights of enforcement the contract provides for being given to the employees on whose behalf the contract was entered into. Under the latter, on the other hand, the union would still be able to enforce directly against the employer any rights obtained through the contract, even though the third party beneficiaries of such contract be individual employees. In *Christiansen v. Local 680*,⁹⁷ for example, where the court adopted the agency theory, it was held that the union had no cause of action against an employer who, in alleged violation of a closed shop collective bargaining agreement, discharged four union employees. Whatever wrong had been committed, the court held, could

95. It is well settled that a collective bargaining agreement, though for a fixed term, does not, in the absence of any other provision, obligate the employer to continue in his employ the employees covered by the agreement, for the duration thereof. The at-will nature of the employment is not changed by the fixed term of the collective bargaining agreement. See section 169, *infra*.

96. See section 163, *supra*, and see also *Kinloch Telephone Co. v. Local Union*, 275 F 241 (CCA 8, 1921) cert. den 257 US 662, 42 S Ct 270, 66 L Ed 423 (1922); *Nederlandsch v. Stevedores*, 265 F 397 (DC ED La 1920); *Alden v. Louisville, etc., R. Co.* 276 SW 511 (Ky 1921); *Whiting Milk Cos. v. Grondin*, 282 Mass 41, 184 NE 379 (1923).

97. 126 NJ Eq 508, 10 A(2d) 168 (1940).

be and had to be vindicated by actions brought by the allegedly wrongfully discharged employees.

Section 169. Construction and Effect of Collective Bargaining Agreements.

Speaking generally, the tendency of the cases are definitely in the direction of a broad and liberal construction of collective bargaining agreements.⁹⁸ It has been seen how the objections of lack of consideration, duress and lack of mutuality of remedy have generally been brushed aside by the cases.⁹⁹ Decisions construing the agreements strictly are waning, and can no longer be relied upon as good law in the face of general emphasis upon the beneficial social effects of collective bargaining.¹

It has been held that, in construing words of doubtful meaning contained in a collective bargaining agreement, the methods employed by the parties in connection with prior and similar agreements will be accorded great weight.² It is well settled a collective bargaining agreement of definite duration does not, in the absence of any provision in the agreement to the contrary, change the at-will nature of the employees' employment thereunder.³ In *Smith v. Chicopee Mfg. Corporation*⁴ a strike was settled by the execution of a collective bargaining agreement which provided, among other things, that the employer would not discharge any of the striking employees for a period of eight months. The employer refused nevertheless to re-

98. See *Nederlandsch v. Stevedores Soc.* 265 F 397 (DC ED La 1920). *Yazoo etc. R. Co. v. Webb*, 64 F(2d) 902 (CCA 5, 1933); *Yazoo, etc. R. Co. v. Sideboard*, 161 Miss 4, 133 S 660 (1931).

99. See sections 160-162, *supra*.

1. See, however, section 159, *supra*, for cases construing the consequences of a collective bargaining agreement strictly.

2. *Burton v. Oregon-Washington R. & Nav. Co.* 38 F(2d) 72 (Oregon 1934).

3. *St. Louis, etc. Ry. Co. v. Matthews*, 64 Ark 398, 42 SW 902 (1897), *Lambert v. Georgia Power Co.* 181 Ga 621, 183 SE 814 (1936), *Hudson v. Cincinnati, etc. R. Co.* 152 Ky 711, 154 SW 47, 45 LRA(NS) 184, *Ann. Cas.* 1915B, 98, *Louisville, etc. R. Co. v. Bryant*, 263 Ky 578, 92 SW(2d) 749 (1936) c/f *Rentschler v. Missouri Pacific R. Co.* 126 Neb 493, 253 NW 694, 95 ALR 1 (1934).

4. 102 SE 481 (Georgia 1937).

employ two of the strikers upon reopening of the mill. The two employees thereupon commenced an action setting forth these facts, but the court held that the complaint stated no cause of action because under the agreement the employer retained the right to discharge or to refuse to re-employ, subject only to the restriction that no employee would be discharged or refused employment because he participated in the strike. In *McGlohn v. Gulf, etc. R. Co.*,⁵ it was held that a collective bargaining agreement is not void because it was terminable by either party after 30 days notice in writing. It is generally held, however, that the discharge of a union man and the hiring of a non-union man in his stead will be enjoined as violative of a closed shop collective bargaining agreement.⁶ This, coupled with

5. 179 Miss 396, 174 S 250 (1937), 183 Miss 465, 184 S 71 (1938)

6. See *Weber v. Nasser*, 61 Cal App 1259, 286 P 1074 (1930) appeal dismissed because the controversy was moot, 210 Cal 607, 292 P 637 (1930); *Pearlman v. Millman*, 7 Law & Labor 286 (Mass Super Ct 1925); *Mississippi Theatres Corp. v. Hattiesburg Local U* 174 Miss 439, 164 S 887 (1930); *Hudson Bus Assn v. Hill Bus Co.* 121 NJ Eq 582, 191 A 763 (1937); *Ribner v. Rasco Butter & Egg Co* 135 Misc 616, 238 NYS 132 (1929); *Engelking v. Independent Wet Wash Co.* 142 Misc 510, 254 NYS 87 (1931); *Goldman v. Cohen*, 222 AD 631, 227 NYS 311 (1928); *Schlesinger v. Quinto*, 201 AD 487, 194 NYS 401 (1922); *Weintraub v. Spilke*, 142 Misc 867, 255 NYS 50 (1931); *Roosevelt Amus. Corp. v. Empire State Motion Picture Operators U.* 144 Misc 644, 258 NYS 240 (1930); *Suttin v. Unity Button Works*, 144 Misc 784, 258 NYS 863 (1932) *aff'd* 236 AD 792, 258 NYS 1049 (1932); *Leveranz v. Cleveland Home Brewing Co.* 24 Ohio NP (NS) 193 (1922); *Harper v. Local Union*, 48 SW(2d) 1033 (Tex Civ App 506

1932) *Contra*, because a court of equity will not intervene in employment contracts *Schwartz v. Wayne Circuit Judge*, 217 Mich 384, 186 NW 522 (1922); *Mosshamer v. Wabash Ry. Co* 221 Mich 407, 191 NW 210 (1922); *Schwartz v. Cigar Makers International Union*, 219 Mich 589, 189 NW 55 (1922); *Stone Cleaning & Pointing Union v. Russel*, 38 Misc 513, 77 NYS 1049 (1902); *Berkhammer v. Cleveland & Morgantown Coal Co.* 8 Law & Labor, 217 (W Va Circuit Ct 1928)

See also *Cross Mountain Coal Co. v. Ault*, 157 Tenn 461, 9 SW(2d) 692 (1928) holding an employer to have breached a collective bargaining agreement where he discharged an employee simply because he was an officer of a certain miners' union, *St. Louis etc. R. Co. v. Booker*, 5 SW(2d) 856 (Tex Civ App 1928) cert. den. 279 US 852, 49 S Ct 348, 73 L Ed 905 (1929) holding an employer bound to respect a ruling made by the Federal Labor Board that an employer had been unjustly discharged, where the ruling had been authorized by and had followed the procedure required by the terms

the fact that under many agreements the employer's right to discharge is conditioned upon the existence of "good cause" as that term is defined in the agreements, results in effect in the imposition of a duty upon employers to retain in their employ those covered by the agreements, while leaving the very same employees free to quit their employment without legal liability. Labor's response to the complaint stated in the preceding sentence is that the argument as thus stated is dreadfully unrealistic. The complained-of situation is socially desirable, says labor, because under it the workingman's frame of mind is stabilized by the security which he feels in connection with his job. Moreover, continues labor, in point of economic fact, as distinguished from traditional legal theory, it is the workingman and not the employer who, in the generality of cases, needs protection as concerns the guaranty that he will remain on the job. It is added that union discipline of its members, which is always an important adjunct to collective bargaining, is quite equal to the task of enforcing the obligations of the individual employee. In this connection the case of *Cross Mountain Coal Co. v. Ault*⁷ needs to be stated, for there, the at-will nature of employment under the terms of a collective bargaining agreement for a fixed term was demonstrated to the employer's advantage. The employer shut down his coal mine because of unfavorable business conditions. It was held that he had not thereby breached the agreement.

In *Chinese American Restaurant Corp. v. Finigan*,⁸ where the agreement provided that the union was to supply the employer, an owner of a restaurant, with eight musicians, it was held that the union had a right under the agreement to withdraw some of the musicians playing for the employer, and to substitute other musicians in their stead. In *Re*

of the collective bargaining agreement, and *Sum v. Independent Retail Fruit Merchants Assn.* 144 Misc 684, 258 NYS 609 (1932) where an employer was found guilty of criminal contempt for failure to obey an injunction ordering him to desist from

further violating the provisions of a closed shop agreement.

7. 157 Tenn 461, 9 SW(2d) 692 (1928).

8. 272 Mass 360, 172 NE 510 (1930).

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Division 132, A. A. S. E. R. E.⁹ it was held that an agreement to arbitrate could not be spelled out from an undertaking by an employer to treat with the committee of the union and the officers thereof in connection with matters that might in the future arise. While it has been held that an arbitration provision contained in a collective bargaining agreement is no bar to a court proceeding in disregard of the arbitration provision,¹⁰ the general rule is that the machinery for adjustment contained in the agreement must be followed before the institution of suit.¹¹ In *McClure v. Louisville & N. R. Co.*¹² an employee possessed of seniority rights in a certain department by virtue of a collective bargaining agreement, accepted employment in another department. It was held that he had thereby lost the seniority accorded to him as an employee in the first department.¹³ It

9. 196 AD 206, 188 NYS 353 (1921).

10. *Rentschler v. Missouri P. R. Co.* 126 Neb 493, 253 NW 694 95 ALR 1 (1934). See also *Engelking v. Independent Wet Wash Co.* 142 Misc 510, 254 NYS 87 (1931), *Preble v. Architectural I. W. Union*, 260 Ill App 435 (1931).

11. *Harrison v. Pullman Co.* 68 F (2d) 826 (CCA 8, 1934), *Bell v. Western R. Co.* 228 Ala 328, 153 S 434 (1934); *Keller v. Western R. Co.* 228 Ala 336, 153 S 441 (1934), *Goldstein v. I.L.G.W.U.* 328 Pa 385, 196 A 43 (1938); *St. Louis etc. R. Co. v. Booker*, 5 SW(2d) 856 (Tex Civ App 1928) cert den 279 US 852, 49 S Ct 348, 73 L Ed 995 (1929). See also *Segenfeld v. Friedman*, 117 Misc 731, 193 NYS 128 (1922).

12. 16 Tenn App 369, 64 SW(2d) 538 (1933).

13. For other cases involving the meaning and effect of seniority rights under collective bargaining agreements, see *Christenson, Seniority Rights under Labor Union Working Agreements* (1937), 11 Temp LQ 355 (1937). See also *Capra v. Local 508*

Lodge, 102 Colo 63, 76 P(2d) 738 (1938), *Evans v. Johnston*, 300 Ill App 78, 20 NE(2d) 841 (1939); *Lockwood v. Chitwood*, 89 P(2d) 951 (Oklahoma 1939). An important question in connection with the assertion of seniority rights under collective bargaining agreements and the employee's legal ability to enforce such rights in equity is whether they are "property" rights so as to be amenable to equitable intervention, or "personal" rights so as to be beyond equity's historically settled jurisdiction. In Mississippi and Kentucky, the view is taken that seniority rights are unenforceable "personal" rights. *Chambers v. Davis*, 128 Miss 613, 91 S 346, 22 ALR 114 (1922) (*Contra*. *Stephenson v. New Orleans etc. R. Co.* 177 S 509 [Miss 1937]); *Louisville etc. R. Co. v. Bryant*, 263 Ky 578, 92 SW(2d) 749 (1936) (See also *Mosshamer v. Wabash Ry. Co.* 221 Mich 407, 191 NW 210 [1922]); *Ryan v. New York Central R. Co.* 267 Mich 202, 255 NW 305 (1934). In Illinois and Nebraska the opposite view is expressly taken. *Ledford v. Chicago, etc. R. Co.* 298

has been held in Massachusetts that where a corporation which was bound by a collective bargaining agreement, disbanded, and a new corporation was formed to carry on the business of the old one, the new corporation is not bound by the agreement even though there was an identity of stockholders and control in connection with the old and new corporations.¹⁴ A contrary holding involving an attempt by a partnership to form a corporation so as to evade the obligations of the partnership's collective bargaining agreement is found in New York.¹⁵ It has been held that punitive damages cannot be recovered for the breach of a collective bargaining agreement.¹⁶ In *Barth v. Addie*¹⁷ the

Ill App 298, 18 NE(2d) 568 (1939), *Rentschler v. Missouri P. R. Co.* 126 Neb 493, 253 NW 694, 95 ALR 1 (1934). See also *Griffin v. Union Station*, 13 F Supp 722 (DC ND Ill E D 1936). In other states, the right of an employee to assert seniority rights under collective bargaining agreements is assumed. See *Christenson, Seniority Rights under Labor Union Working Agreements*, supra; *Pipin, Enforcement of Rights under Collective Bargaining Agreements*, 6 *Univ Chi L Rev* 651 (1939). See also *McGee v. St. Joseph Belt Ry. Co.* 110 SW(2d) 389 (Missouri, 1937); *McGee v. St. Joseph Belt Ry. Co.* 93 SW(2d) 1111 (Missouri, 1936); *McCoy v. St. Joseph Belt Ry. Co.* 77 SW(2d) 175 (Missouri, 1934); *McCrory v. Kurn*, 101 SW(2d) 114 (Missouri, 1937) (See, for a discussion of Missouri cases, *Hamilton, Individual Rights Arising from Collective Labor Agreements* (1938), 3 *Mo L Rev* 252, 259-266); *Burton v. Oregon-Washington R. & W. Co.* 38 P(2d) 72 (Oregon, 1934).

Another important question involves the right of the labor union to change an individual employee's seniority right under a collective bargaining agreement by subsequent agreement. It generally can be done

in the absence of fraud or bad faith. *Hartley v. Brotherhood*, 283 Mich 201, 277 NW 885 (1938).

14. *Berry v. Old South Engraving Co.* 283 Mass 411, 186 NE 601 (1933). See also *Good Foods, Inc. v. Loupos*, (NJ Ch 1939). It has been held by the National Labor Relations Board that a successor corporation is responsible for the unfair labor practices committed by its predecessor where there is an identity of stock ownership and control. *Beckerman Shoe Corp.* 21 NLRB No 123 (1940).

15. *Goldman v. Rosenzweig*, 10 *Law & Labor* (NY 1928). It has been held by the National Labor Relations Board that certification of bargaining representatives for collective bargaining with the employer corporation under the National Labor Relations Act applies to a successor corporation notwithstanding that the latter was not a party to the original proceeding which resulted in the certification. *Charles Cushman Company*, 15 NLRB 90 (1939).

16. *Manley v. Exposition Cotton Mills*, 47 Ga App 496, 170 SE 711 (1933); *Holland v. Spartanburg Herald-Journal Co.* 166 SC 454, 165 SE 203 (1932).

defendant employer reduced the wage schedules of his employees in breach of a collective bargaining agreement. The employees accepted the lower rate of wages under protest. Later, plaintiff, one of the employees, was discharged. The agreement contained the following provision: "The party of the first part (defendant) shall not discharge any member of the party of the second part (the union) whose salary is payable weekly, unless the party of the first part shall, two weeks prior to such discharge, give to the party of the second part notice in writing of such intention to so discharge such employee; except that any employee may be discharged at any time by paying to him, in advance, two weeks' salary." The trial court awarded judgment to the plaintiff, which the appellate division affirmed, in an amount representing not only the difference, during the period he was employed, between what he was paid and what the collective bargaining agreement provided for, but also the contract wage during the balance of the term fixed by the agreement. The Court of Appeals cut down the plaintiff's recovery, holding that under the agreement "any loss to the plaintiff consequent upon his being discharged was to be liquidated at the money equivalent of what he would have earned under the contract in the next two weeks."

A provision contained in a collective bargaining agreement to the effect that employees employed for a given period of time should be entitled to a week's vacation with pay is equivalent to a provision for additional wages and hence, where the agreement was validly entered into by an employer in reorganization under former section 77B of the Bankruptcy Act, the claim for such additional wages is provable as an expense of administration where the employee is discharged, upon the employer's adjudication as a bankrupt, after the employee had earned the right to the agreed vacation with pay.¹⁸

17. 271 NY 31, 2 NE(2d) 34 (1936), rehearing den. 271 NY 616, 3 NE(2d) 211 (1936).

18. *Willow Cafeterias, Inc. v. Siegel*, 111 F(2d) 429 (CCA 2, 1940).

Section 170. Validity of Closed Shop Agreements.

The question as to whether the closed shop is legal is generally raised by a strike whose purpose it is to induce the employer struck against to adopt the closed shop. Sometimes, however, boycotts and more often picketing are carried on for the purpose. Indeed, picketing in the absence of a strike generally has for its purpose ultimate signature by the employer picketed of a closed shop contract. In general, then, the legality of the closed shop is tested in connection with a given form of labor activity.¹⁹ The fact that a given form of labor activity is illegal in the particular jurisdiction, if carried on for the purpose of securing the closed shop does not, however, indicate that a closed shop agreement would be held illegal in the same jurisdiction. Thus it has been suggested that a boycott carried on for the closed shop would be illegal if carried on by non-employees of the person boycotted.²⁰ Cases holding picketing illegal in the absence of a strike draw a distinction between that which can be fought for by employees and that which can be contended for by strangers to the employment relationship. In Massachusetts the closed shop contract appears to be legal (unless necessitating the discharge of non-union employees), while a strike to secure the closed shop is held illegal.²¹

There are much fewer cases dealing with the validity of the closed shop agreement than there are cases concerned with the legality of strikes, picketing or boycotting carried on for the closed shop. There are cases which say that closed shop contracts are invalid generally because in restraint of trade,²² and there are at least an equal if not greater number of decisions holding closed shop contracts

19. For the legality of the strike for the closed shop, see sections 97-101, *supra*. Picketing for a closed shop is mentioned at section 114, *supra*, and boycotting for a like purpose at section 140, *supra*.

20. *Keith Theatre v. Vachon*, 134 Me 392, 187 A 602 (1936); *Wasiowski v. Bakers Union*, 118 NJ Eq

586, 160 A 494 (1938).

21. See section 97, *supra*.

22. *Campbell v. People*, 72 Colo 213, 210 P 841 (1922); *Christensen v. People* 114 Ill App 40 (1904) *aff'd* 216 Ill 354, 75 NE 108, 108 Am St Rep 219, 3 Ann Cas 966 (1905); *Brennan v. United Hatters*, 73 NJL 729, 65 A 165, 9 LRA(NS) 254, 118

generally valid, as not being in restraint of trade.²³ The main question raised by cases concerned with the validity of closed shop contracts, and the question with which the cases are beginning more and more to deal, is whether a closed shop contract is legal and enforceable, though covering all or substantially all of a given industry in a given community. Some courts hold that a closed shop contract is legal if it affects only some and not substantially all of the employers in the industry, and that the agreement is illegal if governing substantially the entire industry.²⁴ No inquiry is made in these cases whether the union is or is not open for membership to competent workers. New York appears to be alone in holding such a contract valid even though it

Am St Rep 727, 9 Ann Cas 698 (1908).

23. *Shinsky v. O'Neil*, 232 Mass 99, 121 NE 790 (1919); *Smith v. Bowen*, 232 Mass 106, 121 NE 814 (1919); *Goyette v. C. W. Watson Co*, 245 Mass 577, 140 NE 285 (1923); (The Massachusetts rule appears to be that a closed shop contract is legal [*Hoban v. Dempsey*, 217 Mass 166, 104 NE 717 (1914)] provided it does not result in the discharge of non-union men [*Berry v. Donovan*, 188 Mass 353, 74 NE 603 (1905)] "Unions in Massachusetts, acting under legal advice, according to information received by the editor, when they succeed in negotiating a trade agreement for the closed shop, have the employer first discharge all his workers, then negotiate the agreement, and then re-employ the union men." Landis, *Cases on Labor Law*, p 378n). *Harper v. Local Union*, 48 SW(2d) 1033 (Tex Civ App 1932); *Underwood v. Texas & P. R. Co.* 178 SW 38 (Tex Civ App 1915); *David Adler & Sons Co. v. Maglio*, 200 Wis 153, 228 NW 123, 66 ALR 1085 (1929).

24. *Barnes v. Berry*, 156 F 72 (CC SD Ohio, 1907); *Connors v. Connolly*, 86 Conn 641, 86 A 600, 45 512

LRA(NS) 564 (1913); *Lehigh Structural Steel Co. v. Atlantic Smelting & Refining Works*, 92 NJ Eq 131, 111 A 376 (1920); *Four Plating Co. v. Mako*, 122 NJ Eq 298, 194 A 53 (1937); *Upholsterers' Carpet etc Union v. Essex Reed & Fibre Co.* 12 NJ Misc 637, 174 A 207 (1934); *Rehring v. Local Union*, 94 NJL 240, 109 A 367 (1920); *Baldwin Lumber Co. v. Local No 560*, 91 NJ Eq 240, 109 A 247 (1920); *Polk v. Cleveland R Co* 20 Ohio App 317, 151 NE 808 (1925), 23 Ohio L Rep 243 (1925). Accord: *Rest., Contracts*, (1932) sec. 515 (18).

In *Christiansen v. Local 680*, 126 NJ Eq 508, 10 A(2d) 168 (1940) the court said of a closed shop contract, "Only when it appears that the contract by itself, or in conjunction with other similar contracts, or understandings, or customs, imposes a closed shop in substantially an entire industry throughout a considerable area, does the contract become prima facie void and the burden arises of justifying it by showing special circumstances," but the court added "Whether it is susceptible of justification at all is a question on which I express no opinion."

affects the entire industry, and here too no inquiry is made as to the nature of the union involved, whether open or closed to competent workingmen.²⁵ In a third class of cases, the view is taken that closed shop contracts are valid provided the union is open to all competent workers in the industry.²⁶ That New York should presently be the only state which recognizes the validity of closed shop contracts, though such contracts cover an entire industry in the given community, is difficult to understand. It has long been recognized that labor unions must, to exist, extend their influence beyond the confines of a single shop. It has also been recognized that collective bargaining can be possessed of social justice for both sides when employers can be assured that the next fellow is producing under the same or similar union conditions. As far back as 1921, in the oft-cited United States Supreme Court case of *American Steel Foundries v. Tri-City Central Trades Council*,²⁷ the court said: "The strike became a lawful instrument in a lawful economic struggle or competition between employer and employees as to the share or division between them of the joint product of labor and capital. To render this combination at all effective, employees must make their combination extend beyond one shop. It is helpful to have as many as may be in the same trade in the same community united, because in the competition between employers they are bound to be affected by the standard of wages of their trade in the neighborhood. Therefore, they may use all

25. *Williams v. Quill*, 277 NY 1, 12 NE(2d) 547 (1938), app. dismissed, 303 US 621, 58 S Ct 650, 82 L Ed 1085 (1938). See section 76, *supra*, for a statement of the evolution of the New York law in this respect. See also, in this connection, *Des Moines City Ry. Co. v. Amalgamated Ass'n*, 204 Iowa 1195, 213 NW 264 (1927) where the court had before it a closed shop contract. Said the court: "It is insisted further, that the contract is void as against public policy because it, in effect, unionizes

an entire industry. No person is here complaining that he is deprived of his right to freely dispose of his labor, and nothing in the record shows that any person is deprived of such right." See also *Terrio v. Nielson Construction Co.* 30 F Supp 77 (DC ED La 1939); *Ritter v. Milk & Ice Cream Drivers*, (Ohio 1939).

26. See section 99, *supra*, where this view is discussed in detail.

27. 257 US 184, 42 S Ct 72, 66 L Ed 189, 27 ALR 360 (1921).

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lawful propaganda to enlarge their membership and especially among those whose labor at lower wages will injure their whole guild." Nevertheless, the law has consistently been stated to be that a closed shop contract is valid only where it controls some but not all or substantially all of the industries in the given community. Moreover, and in the teeth of the language of the court in the American Steel Foundries case, it has been indicated that labor unions bring themselves within the ban of the Sherman Act and the vague criteria governing the legality of labor activity under that act,²⁸ where the activity constitutes an attempt to secure uniform national conditions governing employment relations so that one non-unionized section of the country does not compete to the detriment of another section which has been unionized.²⁹

The Restatement of Contracts appears to have taken the position that a collective bargaining agreement which establishes a closed shop is illegal if it has the effect of creating a monopoly. In two illustrations to section 515, the Restatement has indicated this viewpoint. Illustration 18 is as follows: "A. bargains with a labor union to employ only union labor. The bargain is legal, unless the union has such a monopoly as virtually to deprive non-union workers of any possibility of employment." Illustration 19 further makes the point as follows: "An association representing nearly all the building contractors in or near a city, bargains with an association representing the building unions that the contractors shall employ only union men. The bargain has for its object the monopolizing of labor on buildings for union laborers. The bargain is illegal where monopoly would thus be obtained so complete as to destroy the possibility of non-union laborers in the building trades obtaining employment."

It is not clear from a reading of the foregoing illustrations just what is meant by the word "monopoly" in connection with the collective bargaining agreement. Is the

²⁸ See *infra*, section 422.

Leader, 310 US 469, 60 S Ct 982, 84 L

²⁹ Apex Hosiery Company v. Ed 1311 (1940).

monopoly established simply by evidence of the fact that the agreement covers the entire industry or that the union extends throughout the given geographical area, or on the other hand is it necessary to prove that the union is not an "open" union, membership wherein is available to all competent workers, and that the employers' association is likewise not open for membership to new business enterprises?

The Restatement of Torts has given a clearer answer. By section 810 it is provided that "workers who in concert procure the dismissal of an employee because he is not a member of the labor union satisfactory to the workers are . . . liable to the employee if, but only if, he desires to be a member of the labor union but membership is not open to him on reasonable terms." In section 788, the Restatement of Torts holds that the closed shop is a legitimate object of concerted activity, but it is added that the object is no longer legitimate "When a demand for restriction does not involve either securing of work for union employees or the maintenance or increase of union membership, subject to reasonable regulation by the union, but is directed toward the establishment of a monopoly privilege in a group of present members of the union to the exclusion of everyone else."

A distinction has been drawn in connection with the validity of closed shop agreements, between the case on the one hand where the parties to the agreement sue each other and the case, on the other hand, where employees, discharged as a result of the execution of the agreement, are the complaining parties. Thus, in *Jacobs v. Cohen*,³⁰ which was an action by a union upon a promissory note given to secure the performance of a closed shop agreement, the plaintiff succeeded in recovering as against the defendant's contention that the agreement was illegal as against public policy. The defendant cited the prior case of *Curran v. Galen*,³¹ wherein an employee discharged in consequence of the execution of a closed shop agreement sought and obtained

30. 183 NY 207, 76 NE 5, 111 Am St Rep 730, 2 LRA(NS) 292 (1905). 31. 152 NY 33, 46 NE 297, 37 LRA 302, 57 Am St Rep 496 (1897).

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damages for the consequent interference with his employment. The court, however, held the case distinguishable partly upon the ground that *Curran v. Galen* (*supra*) was, as heretofore stated, an action by an aggrieved employee who was not party to the agreement while *Jacobs v. Cohen* (*supra*) was an action between parties both of whom had obtained benefits from the agreement. "If they regarded it as beneficial for them to do so," said the court, "does it lie in their mouths now, to urge its illegality? That, incidentally, it might result in the discharge of some of those employed, for failure to come into affiliation with their fellow workmen's organization, or that it might prevent others from being engaged upon the work is neither something of which the employers may complain, nor something with which public policy is concerned." A similar distinction has been indicated in the Iowa case of *Des Moines City Railway Company v. Amalgamated Association*.³² It is not easy to justify the distinction. The aggrieved third party employee, who recovers damages because he has been discharged pursuant to the terms of the closed shop agreement, recovers because the agreement is against public policy. If the agreement is against public policy it would appear difficult to sustain its validity as between the parties thereto. It has been held, for example, that a Statute, which provides that all work performed upon the streets, sewers, boulevards and parks of certain cities shall be performed by union labor only, is void as against public policy partly because non-union workingmen are thereby excluded from employment.³³

Section 171. Union Membership in Connection with Public Work Contracts.

Government exists for the benefit of all, all are required to pay for the support of government, and finally, government has a responsibility to all of its inhabitants alike. These appear to be the three main reasons assigned by the

32. 204 Iowa 1195, 213 NW 264 145 NW 704, 146 NW 997, 52 LRA (1927). (NS) 728, Ann Cas 1915D, 967

33. *Wright v. Hootor*, 95 Neb 342, (1914).

cases for almost uniformly holding invalid, statutes directing the employment of union labor in connection with public work contracts.³⁴ It has, however, been held that a state purchasing agent did not abuse his discretion in awarding one of a group contract in the sum of \$17,700 for plumbing and heating work on public buildings to A., although there was a bid of \$300 less by B., where the statute provided that contracts shall be awarded "to the lowest responsible bidder, taking into consideration the location of the institution or agency," where the work was to be performed in a highly unionized industrial center, where the principal contract of the group had been given to a contractor employing union labor, where A. employed union labor but where B. maintained the open shop.³⁵

Cases involving similar municipal ordinances have likewise held against their validity,³⁶ upon the additional

34. *Adams v. Brennan*, 177 Ill 194, 52 NE 314, 42 LRA 718, 69 Am St Rep 222 (1898); *Wright v. Hoctor*, 93 Neb 342, 145 NW 704, 146 NW 997, 52 LRA(NS) 723, Ann Cas 1915D 976 (1914). For the same reason, a provision prohibiting the employment of alien or convict labor is invalid. *Inge v. Board of Public Works*, 135 Ala 187, 33 S 678, 93 Am St Rep 20 (1902). See *Truax v. Raich*, 239 US 33, 36 S Ct 7, 60 L Ed 131, LRA1916D, 545, Ann Cas 1917B, 283 (1915).

35. *Pallas v. Johnson*, 100 Colo 449, 68 P(2d) 539, 110 ALR 1403 (1937). Accord *A. H. Pugh Printing Co. v. Yeatman*, 22 Ohio CC 584, 12 Ohio CD 477 (1901). *Contra* *State ex rel. United Dist Heating v. State Office Building Commission*, 125 Ohio St 301, 181 NE 129, 80 ALR 1379 (1931), where the court said: "The claim is made that costly delays and added expenses may occur because of possible trouble, if this contract be not awarded to the bidder employing union labor. This claim assumes that a great state

cannot control its laws requiring public bidding, cannot protect its citizens from unconstitutional discriminations." In *Smith Brooks Printing Co. v. Young*, 103 Colo 199, 85 P(2d) 39 (1938) a statute was held constitutional which required printing contractors' employees to observe prevailing standards of working hours and conditions fixed by a state industrial commission.

36. *Atlanta v. Stein*, 111 Ga 789, 36 SE 932, 51 LRA 335 (1900); *Holden v. Alton*, 179 Ill 318, 53 NE 506 (1899); *Fiske v. People*, 188 Ill 206, 58 NE 985, 52 LRA 291 (1900); *Grey v. People*, 194 Ill 486, 62 NE 894 (1902); *Miller v. Des Moines*, 143 Iowa 409, 122 NW 226, 23 LRA (NS) 815, 21 Ann Cas 207 (1909); *Goddard v. Lowell*, 179 Mass 496, 61 NE 53 (1901); *Finlay v. Boston*, 196 Mass 267, 82 NE 5 (1907); *Patterson Chronicle Co. v. Paterson*, 66 N.JL 129, 48 A 589 (1901); *Elliott v. Pittsburgh*, 6 Pa Dist R 455 (1897); *Marshall & B. Co. v. Nashville*, 109 Tenn 495, 71 SW 815 (1903).

grounds that the ordinance is not within the scope of the powers conferred upon the municipality,³⁷ or that it is violative of a charter provision directing contracts for public work or supplies to be given to the lowest bidder,³⁸ or that the ordinance conflicts with a statutory provision to the effect that the city council shall take no part in the making of public contracts,³⁹ or that the cost of the work to the taxpayers is thereby enhanced,⁴⁰ or that it tends to a monopoly,⁴¹ or that it constitutes an improper exercise of discretion by an administrative board.⁴² In one case, the ground of invalidity in connection with the given enactment was found in a provision contained in the State Constitution to the effect that every person shall be given a remedy for injuries inflicted upon him.⁴³

In spite of the uniformity with which the courts have declared invalid, statutes or ordinances prescribing union labor on public contracts, the courts have not been one in holding invalid, contracts entered into under such statutes or ordinances.⁴⁴ The reason for the conflict apparently arises from the reluctance of courts to deny compensation to one who has done work and expended money and has conferred a benefit upon the state or municipality setting up the defense of ultra vires or illegality.

In England, under the Trade Disputes and Trade Unions Act of 1927⁴⁵ public authorities are prohibited from condi-

37. See *supra*, note 34.

38. *Holden v. Alton*, 179 Ill 318, 53 NE 556 (1899); *Elliott v. Pittsburgh*, 6 Pa Dist R 455 (1897); *Marshall & B. Co. v. Nashville*, 109 Tenn 495, 71 SW 815 (1903).

39. *Goddard v. Lowell*, 179 Mass 496, 61 NE 53 (1901).

40. *Atlanta v. Stein*, 111 Ga 789, 36 SE 932, 51 LRA 335 (1900).

41. *People ex rel. John Single Paper Co. v. Edgecomb*, 112 AD 604, 98 NYS 965 (1906).

42. *State ex rel. United District Heating, Inc. v. State Office Building Commission*, 124 Ohio St 413, 179

NE 138 (1931). See also *Lewis v. Bd. of Education*, 139 Mich 306, 102 NW 756 (1905); *Davenport v. Walker*, 57 AD 221, 68 NYS 161 (1901).

43. *Finlay v. Boston*, 196 Mass 267, 82 NE 5 (1907).

44. Invalid: *State ex rel. Robert Mitchell Furniture Co. v. Toole*, 26 Mont 22, 66 P 496, 58 LRA 644, 91 Am St Rep 386 (1901); *Atlanta v. Stein*, 111 Ga 789, 36 SE 932, 51 LRA 335 (1900). Valid: *Marshall & B. Co. v. Nashville*, 109 Tenn 495, 71 SW 815 (1903); *Grey v. People*, 194 Ill 486, 62 NE 894 (1902).

45. 17 and 18 Geo. V, c. 22.

tioning contracts upon union membership or non-membership.

In *Bohn v. Salt Lake City*,⁴⁶ it was held that stipulations contained in a bid by a municipality for construction work, to the effect, among other things, that a minimum wage would be paid by the contractors, were held invalid because *ultra vires* the municipality.⁴⁷

Section 172. Need for New Legal Conceptions.

The unfolding of the law governing collective bargaining agreements which the previous sections have undertaken to describe, reveals the inadequacy of present legal categories to deal with the many new problems which these agreements have raised. The view has consequently been taken⁴⁸ that "we need a new legal category" to explain and to govern these agreements. Violation of collective bargaining agreements under this suggestion would be in the nature of a tort rather than breach of contract, because "they do not easily fit into existing conceptions of mere customs or of mere contracts, or even of the two combined." "At all events," it is said, "no social interest disfavors the giving of legal effect to the intention of the parties to establish a structure of employment relations which will govern the course of dealings not between particular known individuals, but between indefinite persons engaged in an industry."⁴⁹ That the market place should demand of

46. 8 P(2d) 591 (Utah 1932).

47. See also *Hillig v. City of St. Louis*, 337 Mo 291, 85 SW(2d) 91 (1935); *McDonough v. Washington*, 20 Pa Co Ct 345 (1898); c/f *Ebbeson v Bd. of Public Education*, 18 Del Ch 37, 156 A 286 (1931); *Alt-schul v. Springfield*, 48 Ohio App 356, 193 NE 788 (1933).

48. Rice, *Collective Labor Agreements in American Law* (1931), 44 Harv L Rev 572, 606, 607. See also Dugeuit, *Collective Acts as distinguished from Contracts* (1929), 29 Col L Rev 441, 459. c/f Note, 31 Col L Rev 1156 (1931): "The sug-

gestion that collective agreements be viewed as a new legal category, while interesting and perhaps the only way out of all the difficulties, is scarcely practical."

49. See also Anderson, *Collective Bargaining Agreements* (1936), 15 Ore L Rev 229, 250-253. c/f the suggestion of M. C. Dransfield, in 95 ALR 56: A distinction is drawn between those provisions of the collective bargaining agreement which give rights to the individual employee (such as seniority rights), and those which concern only the union (such as a provision for a closed

the law a different and more effective way of dealing with newly arising problems is nothing novel to our law. The law merchant thus became part of the common law. It is as important as it is to maintain industrial peace that a like process be made the subject of conscious judicial treatment.

The peculiar nature and legal consequences of the collective bargaining agreement have induced a New Jersey court⁵⁰ to liken it to the notion of group insurance. "The relation between the collective bargain and the individual contract of employment," it is said, "somewhat resembles that between a group insurance policy and the individual insurance certificates issued under it. The contract between employer and union not only enters into the individual contract, but it circumscribes the rights of the employer and the members of the union with respect to making individual contracts of employment. It creates legal rights and duties which are independent of particular hirings."⁵¹

Section 173. Emergence of View That Collective Bargaining Agreements Establish "Law of the Land" for the Industry.

That a collective bargaining agreement should be considered as establishing a "law of the land" for the industry is a notion which, at least in theory, is foreign to our law. Moreover, the notion involves constitutional difficulties, especially the conception against delegation of powers. N.I.R.A. codes established what might be termed such a "law of the land" for the industrial units which they con-

shop). As to the former class of provisions, employees would be considered as suing with respect to matters embodied in their individual contracts of employment. As to the latter class of provisions the union would be suing in connection with matters as to which the agreement concerns it as an entity.

⁵⁰ *Christiansen v. Local 680*, 126 N.J. Eq 508, 10 A(2d) 168 (1940).

⁵¹ Nevertheless the court held,

somewhat inconsistently with the tenor of its opinion, that a labor union which is party to a closed shop agreement has no right of enforcement of the agreement upon the employer's breach thereof by discharging four union employees, but that whatever rights there were wronged needed to be vindicated by individual actions brought by the aggrieved employees.

trolled, and it was partly because the codes did so that the Act was held unconstitutional in the Schechter case.⁵² Law making by groups other than traditionally elected or appointed law makers is said to be abhorrent to our form of government. In spite of the disfavor, however, in which the general notion, as above stated, is held, there can be no doubt that collective bargaining agreements have been increasingly assuming the role of establishing rules which, in effect, govern the given industry. The following situations, which admit of a threefold classification, and which will, accordingly, be discussed in the following three sections, will demonstrate the point. The first class of situations includes cases where an employer, in order to do business in the industry, must become a party to the agreement by joining the employers' association which has theretofore entered into the agreement; the second class comprehends cases wherein an employer, though not party to a collective bargaining agreement, must conform to its terms, sometimes under pain of boycott, while the third class of situations is that wherein collective bargaining agreements are given normative effect, as under the Wage and Hour Law.

Section 174. Cases Wherein Employer Must, to Do Business, Become Party to the Agreement.

In *American Fur Manufacturers Assn., Inc. v. Associated Fur Coat & Trimming Manufacturers, Inc.*,⁵³ the defendants, a labor union and an employers' association respectively, were sued because they refused to give to the plaintiff association the benefits of the collective bargaining agreement entered into by them, unless the plaintiff associated itself with the defendant employers' association. The collective bargaining agreement which the defendants had negotiated provided that "there shall be but one collective labor agreement in the fur manufacturing industry in the Greater City of New York." Defendants insisted that they had a right to take the stand they did, and the

⁵². *Schechter Poultry Corp. v.* (1935).

United States, 295 US 495, 55 S Ct

⁵³. 161 Misc 246, 201 NYS 610
837, 70 L Ed 1570, 97 ALR 947 (1936).

court agreed with the defendants. Similarly in *Weitzberg v. Dubinsky*,⁵⁴ the court held legal and hence unenjoinable a strike called by a union which was designed to compel the plaintiffs to resign from one employers' association, and again to become members of another employers' association from which they had theretofore resigned.

The rationale of these cases is that there is an interest possessed by the union in collective bargaining with a single association instead of with many employers; that the collective bargaining agreement ought to establish a norm in the industry to which all employers must conform; that, to secure such conformance, employers can legally be required, as a condition to doing business in the industry, to become a member of the employers' association established in the industry, because only by the singleness of the employers' association and the discipline exercised by it over its members can collective bargaining agreements become the "law of the land" for the industry.

Danger that arrangements such as those discussed in the present section may be utilized with facility to ends of racketeering and extortion is ever present. In *United States v. Local 167*,⁵⁵ a conspiracy to obstruct interstate commerce, which had thereto resulted in successful criminal prosecution,⁵⁶ was made the subject of injunction under the Sherman antitrust law. It there appeared that the defendant marketmen in the wholesale poultry business organized a Chamber of Commerce, allocated retailers among themselves and regulated and enhanced prices. The defendant labor union participated in the scheme by refusing to handle poultry for marketmen who would not become members of the Chamber of Commerce or who refused to cooperate with the parties to the conspiracy. Members of a so-called "Schochtims" union, composed of people qualified to

54. 173 Misc 350, 18 NYS(2d) 97 (1940), *aff'd* 21 NYS(2d) 512 (1940). See section 102, *supra*, for a general discussion of the legality of strikes in cooperation with and for the benefit of employers and employers' associations, and a more general citation of

cases upon the point.

55. 291 US 293, 54 S Ct 396, 78 L Ed 804 (1934).

56. 47 F(2d) 156 (CCA 2, 1931), *cert. den.* 283 US 837, 51 S Ct 486, 75 L Ed 1448 (1931).

slaughter poultry in accordance with the Jewish dietary laws, likewise assisted in the conspiracy by refusing to slaughter for non-cooperating wholesalers.

Danger also exists that collective bargaining agreements may become vehicles for restraints of trade. Thus, for example, in *DeNeri v. Gene Louis, Inc.*,⁵⁷ the union sued to enjoin an employer, proprietor of a beauty parlor with whom the union had theretofore entered into a collective bargaining agreement, from violating a price-fixing provision therein contained, under the terms of which the employer was required to charge given rates for his services. The agreement was held illegal as violative of the Donnelly Antitrust Act.⁵⁸

Section 175. Cases Wherein Employer, Though Not Party to Agreement, Must Conform to Its Terms.

In *National Fireproofing Co. v. Mason Builders' Assn.*,⁵⁹ the plaintiff sued to have a collective bargaining agreement to which the defendants employers association and labor union were parties and to which he was not a party, declared void, upon the ground that it interfered with his business. Under the agreement, members of the union were permitted to work for employers not members of the association, but only provided they followed the rules and regulations contained in the agreement. Under two of the clauses in the agreement, a person engaged in the manufacture and installation of fireproofing was prohibited from installing its fireproofing in the City of New York unless he took the entire contract for erecting a building. The complainant desired to take separate contracts for fireproofing installation, and insisted that, insofar as the collective bargaining agreement prevented him from doing business in this manner, it was an agreement in restraint of trade. The court, however, held to the contrary, saying that on the whole, the agreement reflected the needs of the industry and a fair attempt to solve some of the difficulties

57. 104 NYLJ 37 (1940).

340. See *infra*, section 456.

58. General Business Law, section

59. 162 F 259 (CCA 2, 1909).

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encountered by the industry. In *Abeles v. Friedman*,⁶⁰ it appeared that a collective bargaining agreement existed in the garment industry, under the terms of which jobbers were made responsible for the labor conditions of their contractors. The plaintiff jobber refused to become a party to the agreement, and refused also to assume responsibility for the terms and conditions under which his contractor was employed. The union thereupon called a strike among the contractor's employees, and commenced to picket the jobber's premises. The plaintiff sued to enjoin the labor activity thus carried on under the circumstances, but the court refused to grant the injunction, holding that through custom and usage and as codified by a collective bargaining agreement in the industry, the jobber was so associated with his contractor as in contemplation of labor relations law to be an employer of the latter's employees.⁶¹ In *Brisbin v. E. L. Oliver Lodge*⁶² the plaintiff lost her employment upon its being discovered that she had married, because of a provision contained in a collective bargaining agreement directing the discharge of female employees upon their marriage, and this in spite of the fact that she was not a member of the union which had entered into the agreement.

*Sainer v. Affiliated Dress Manufacturers*⁶³ might also well be stated in this connection. In that case the plaintiff, a contractor in the dress industry, complained of the method by which work was parcelled out under the terms of a collective bargaining agreement to which jobbers, manufacturers and contractors in the industry were members. The plaintiff, though a member of the contractors' association which was one of the parties to the agreement, sought a declaratory judgment voiding the agreement, upon the ground that it was in restraint of trade. The court held otherwise, stating here, as was stated in the *National Fireproofing Company* case (*supra*) that the collective bar-

60. 171 Misc 1042, 14 NYS(2d) NE(2d) — (1940).
252 (1939).

62. 279 NW 277 (Nebraska 1938).

61. *c/f Lawrence Avenue Building Corp. v. Van Heck*, — Ill App —, — (1938).
63. 168 Misc 319, 5 NYS(2d) 855
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gaining agreement was designed to stabilize the dress industry.

Section 176. Cases Wherein Agreement Establishes a Norm.

Under the Federal Wage and Hour Law⁶⁴ employees are exempted from the operation of the Act where covered by a collective bargaining agreement provided: (1) the labor union involved in the agreement is a bona fide labor organization; (2) the agreement provides for not more than 1000 hours of employment during any period of 26 consecutive weeks, or not more than 2000 hours during any period of 52 consecutive weeks. The National Labor Relations Board is charged with the duty of certifying as bona fide the contracting labor organization.⁶⁵

Under the New York anti-"kick-back" statute,⁶⁶ the violation of which constitutes a misdemeanor, it is provided that "Whenever an agreement between a bona fide labor organization and an employer or an association of employers requires that workmen shall be paid an agreed wage or rate of wages for their services, it shall be unlawful for any person, either for himself or any other person, to request, demand or receive, either before or after such workman is engaged, that such workman pay back, return, donate, contribute or give any part or all of said workman's wages, salary, or thing of value, to any person, upon the statement, representation or understanding that failure to comply with such request or demand will prevent such workman from procuring or retaining employment. . . ."

In *Reichert v. Quindazzi*,⁶⁷ it was held that a contract entered into between an employer and a union which provided for a given wage scale precluded the individual members of

64. Fair Labor Standards Act of 1938 Act of June 25, 1938, 52 Stat. 1060, 29 USCA secs. 201 et seq

65. See section 402, *infra*, for a more extended consideration of the collective bargaining provisions of the Fair Labor Standards Act of 1938, including a discussion of the proce-

dure adopted by the National Labor Relations Board in connection with the certification of labor unions as bona fide for the purposes of the Act.

66. Penal Law, section 962.

67. 6 NYS(2d) 284 (Mun Ct City of New York, 1938).

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the union, without the union's knowledge or consent, from entering into a valid agreement providing for less compensation.⁶⁸

Section 177. Effect of Norris and National Labor Relations Acts.

It has been seen in a former section that under two of the State Labor Relations Acts (unlike the National Labor Relations Act) violation of the terms contained in collective bargaining agreements in made an unfair labor practice.⁶⁹ Other consequences affecting collective bargaining agreements are contained both in the Norris Act and in the National Labor Relations Act. The broad definition of the term "labor dispute" contained in the Norris Act⁷⁰ has raised the problem whether a suit to enforce observance of a collective bargaining agreement is a "labor dispute" under the Act. It would seem that such a suit does, in the light of the broad scope of the Norris Act, constitute a "labor dispute,"⁷¹ but the federal courts have not yet been presented with a case upon the subject.^{71a} A second problem raised is whether a suit to enjoin labor activity, such as a strike, picketing or boycotting, when carried on in breach of

68. Accord: *McNeil v. Hacker*, 21 NYS(2d) 432 (City Court, City of New York, NY Co 1940) In this case the collective bargaining contract contained a provision by which the employer agreed "not to enter into any private agreement with any employee covered by this agreement, to perform work at a lower rate of wages than stipulated in this agreement" See also *Witmer*, *Collective Labor Agreements in the Courts* (1938), 48 Yale L Jour 195, 235: "The tendency of the cases is pretty clearly in the direction of saying that an inconsistent agreement between employer and employee is no bar to the latter's suing on the collective bargain."

69. See *supra*, section 164.

70. See *infra*, sections 209-212.

71. See Note (1938), 51 Harv L Rev 520, 531: "Specific performance of collective agreements is ordinarily secured by means of injunctive relief. It would seem then that if a controversy over the enforcement of a collective agreement is a 'labor dispute,' as it surely is, the requirements of these statutes must be fulfilled before injunctive relief can be granted"

71a. See *Scandi v. Debnar*, 104 NY LJ 265 (S Ct Bronx Co 1940) holding a suit for specific performance of a collective bargaining agreement indistinguishable from a suit to restrain violation of a collective bargaining agreement and further holding that both types of suits are "labor disputes" under the state anti-injunction law.

collective bargaining agreement, involves a "labor dispute" under the Act so as to make the activity unenjoinable without a showing of the requirements which condition the issuance of an injunction under the Act.⁷² In *Wilson & Co. v. Birl*,⁷³ it was stated that a "labor dispute" was involved. State court cases interpreting anti-injunction legislation modelled after the Norris Act have held in accord,⁷⁴ and to the contrary.⁷⁵ The wisdom of holding suits, whether to enforce collective bargaining agreements or to enjoin their further violation, is doubtful. It cannot be denied that a rule holding such suits to constitute "labor disputes" impairs the legal enforceability of collective bargaining agreements. Again, anti-injunction legislation evidences a purpose, if its historical background is considered, of dealing with labor disputes and the practice of using a court of chancery as a policing power in connection with such disputes. It is foreign both to the history and context of anti-injunction statutes to extend their application to litigation relating to collective bargaining agreements. Finally, it is difficult to understand the nature of the obligation to make efforts at settlement (an obligation which usually preconditions the issuance of injunctions under modern anti-injunction enactments) in the face of the violation of a collective bargaining agreement arrived at by negotiations and with the view toward effecting a settlement of a controversy.

72. See *infra*, sections 215-224

73. 105 F(2d) 948 (CCA 3, 1939).

74. See *The Nevins v. Kasmach*, 270 NY 323, 18 NE(2d) 294 (1934); *Scandi v. Debnar*, 104 NYLJ 265 (S Ct Bronx Co 1940); *Gaib & Jaffe Fur Dressing Corp. v. Karass*, 104 NYLJ 488 (1940); *Bulkin v. Sacks*, 31 Pa D & C 501 (1938); *Tobin v. Shapiro*, 32 Pa D & C 291 (1938). A 1939 amendment to the Pennsylvania Anti-Injunction Act made the Act inapplicable to any case, among others, involving the breach of a contract arrived at between an employer and the representatives of his employees designated or selected by the

employees as their bargaining representative pursuant to the State or National Labor Relations Acts, unless the complaining person has committed an unfair labor practice in violation of the State or National Labor Relations Acts, or violated any of the terms of the agreement.

75. See *Greater City Master Plumbers Union v. Kahme*, 6 NYS (2d) 589 (1937); *F. Everett, Inc., v. Penna*, 168 Misc 589, 6 NYS(2d) 630 (1938); *J. I. Hass Co. v. McNamara*, 21 NYS(2d) 441 (1940); *McCarthy v. Brotherhood of Painters*, 102 NYLJ 393 (NY Co S Ct August 17, 1939).

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Would it be unreasonable for union or employer to insist upon observance of the agreement? Need the making of efforts designed to effect a settlement include willingness to agree to modifications of the agreement? It has been held under the National Labor Relations Act, for example, that the obligation to bargain under Section 8(5) of the Act includes the obligation to negotiate for the modification of an existing agreement.⁷⁶

The National Labor Relations Act has raised three main problems in connection with collective bargaining agreements. The first has reference to the validity of such agreements entered into with a company dominated union or a union which at the time of the entering into of the agreement represented but a minority of employees. The negotiating of collective bargaining agreements under such circumstances has been held to constitute an unfair labor practice.⁷⁷

The second relates to the effect of valid agreements entered into with the proper bargaining agency of the employees, upon the Board's right to certify another bargaining agency during the life of the agreement upon change of allegiance by the employees with the result that a bargaining agency other than the one which entered into the collective bargaining agreement possesses a majority among the employer's employees. There is nothing in the National Labor Relations Act which authorizes the Board to refuse to entertain a petition for certification because of the existence of a collective bargaining agreement, and in early cases the Board held that certification of a union will be made notwithstanding the existence of a collective bargaining agreement entered into by an employer with another union in conformity with the Act,⁷⁸ but the present rule, adopted in the interest of stability of industrial relations, is that a properly entered-into collective bargaining agreement will constitute a bar to certification for the period of

76. See *NLRB v. Sands Mfg. Co.* NLRB 983 (1937).
306 US 332, 59 S Ct 508, 83 L Ed 682 (1939); *Louis Hornick & Co.* 2
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77. See *infra*, section 324.
78. See *infra*, section 335.

one year after the execution of such agreement.⁷⁹

The third has reference to the effect upon the agreement, of the certification by the Board of a different bargaining agency. We are dealing here with as yet uncharted legal fields.⁸⁰ Uncertainty in this connection is aggravated first by the imperfect development of the collective bargaining agreement and the confused state of the law governing the agreement, and second, by the lack of any theory by which anything contained in the National Labor Relations Act may be said to affect the validity of a collective bargaining agreement which, when entered into, satisfied the requirements of existing law. It would seem that the validity of a collective bargaining agreement is not impaired by certification of a bargaining agency different from that which entered into the agreement with the employer. Nevertheless the Board has indicated that the employer's obligation to bargain collectively and in good faith with the proper bargaining agents of his employees includes the duty to negotiate in connection with the possible modification of existing agreements.⁸¹ Suppose, now, that the employer is amenable to negotiations aimed at the modification

79. See *infra*, section 335. The nature of the obligation to bargain collectively imposed by Section 8(5) of the National Labor Relations Act is discussed *infra*, at sections 326-352. The effect upon a collective bargaining agreement of a finding by the National Labor Relations Board that the union which has entered into the agreement with the employer is company dominated, is considered *infra*, at sections 271, 366. Collective bargaining agreements entered into with a bona fide union, as with a union affiliated with the A.F.L., are the reflections of unfair labor practices where the union has been assisted by the employer prior to the time of execution of the agreement. See *infra*, section 324.

80. See, however, *LaBarge v. Malone Aluminum Corp.* 6 LRR 887

[1 Teller]—34

(*Franklin Co S Ct NY* 1940), wherein it was held that a contract entered into by an employer with one union, which was for one year or longer depending upon the absence of any notice to terminate, was valid notwithstanding that the State Labor Board thereafter certified another union as the proper bargaining agency of the employees, and hence that the contracting union might sue to enjoin violation of the contract. See also *infra*, section 211; Anderson, *Validity of Collective Agreements after Change of Union Affiliation* (1940), 38 Mich L Rev 516.

81. See *Sands Mfg Co.* 1 NLRB 546 (1936), reversed on other grounds in 306 US 332, 59 S Ct 508, 83 L Ed 682 (1939); *Louis Hornick & Co.* 2 NLRB 983 (1937).

of the agreement; what theory can be advanced to justify alteration of the rights of dissenting employees who obtain benefits under the existing agreement? If it be assumed that the agreement establishes a usage,⁸² that usage normally continues during the life of the agreement; does the new bargaining agent have the power to change the character of the usage? It would need to be contended that the usage is of such a nature as to be changeable by a proper bargaining agent, even during the life of the agreement. Again, if it be assumed that the individual employees were the principals on whose behalf the bargaining agent entered into the existing agreement,⁸³ a theory would need to exist for the purpose of explaining how, during the life of the agreement, dissenting employees who are principals may have their rights affected by agents whom they did not authorize. Here it would need to be assumed that the principalship is a joint or entity principalship and not an aggregate of independent principals. Nor would this be too unrealistic an assumption, since collective bargaining assumes the merger of single employees into a cohering, single group. Finally, assuming that the individual employees obtain rights as third party beneficiaries of the agreement entered into by the bargaining agent as principal for the benefit of the individual employees,⁸⁴ a theory would need to exist for explaining how the agreement could be modified during the life thereof, to the detriment of dissenting employees. Beneficiaries' rights may be modified, to be sure, by the bona fide dealings of the parties to the agreement,⁸⁵ but here again we have the hurdle of explaining how a bargaining agent different from that which entered into the existing agreement may affect the rights of the dissenting employees. Perhaps it might be said that

82. See, for a discussion of the usage theory in connection with collective bargaining agreements, *supra*, section 159.

83. See, for a discussion of the theory that individual employees take as principals under collective

bargaining agreements, *supra*, section 167.

84. See, for a discussion of the theory that individual employees take as third party beneficiaries of collective bargaining agreements, *supra*, section 168.

85. See *supra*, section 168.

the principal which entered into the existing agreement is not the particular union or other group then authorized, but the then proper representative of the employees. Change of representation would then result either in the proper appointment of a successor principal, or in the continuation of the old principal with changed identity.

CHAPTER ELEVEN

ARBITRATION AGREEMENTS

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Section 178. Arbitration Defined, and Distinguished from Mediation and Appraisal.

Arbitration is the procedure by which controversies are, pursuant to voluntary agreement of the parties, resolved by tribunals other than those traditionally constituted by law. The notion of arbitration includes two distinct types of arrangements: First, an agreement to submit an existing controversy; second, an agreement to submit to arbitration future controversies arising out of an existing agreement. The first type of arrangement is referred to as a "submission agreement," while the second type of arrangement is generally referred to as an "arbitration clause." The distinction between the two types of arrangements is not an academic one, but on the contrary, has important legal consequences, the most outstanding one of which is that the latter type of arrangement is specifically enforceable in only 13 states and under the federal arbitration act, while the former type of arrangement is irrevocable and legally enforceable in all but two of the states (Oklahoma and South Dakota). Distinctions between commercial and industrial arbitration are set forth in the following section.

Mediation is the intervention of a third party in a dispute for the purpose of conciliating the contending parties.¹ While mediation sometimes takes place pursuant to statutory machinery, as under the Railway Labor Act, it is not essentially a characteristic of the legal order, as is arbitration. Most of the state statutes dealing with the arbitration of labor disputes contain provisions for the mediation of such disputes.²

"Appraisal" has reference to the appointment of a third party or third parties to determine stipulated facts, and differs from arbitration in that the latter includes the determination of ultimate legal liability. "It is frequently difficult to determine whether the agreement is one of arbitration or appraisal; but the final test should be whether or not the parties intended the 'arbitrators' to determine ultimate liability or merely facts incidental thereto."³ A consequence of the distinction between appraisal and arbitration may be found in the Washington case of *Gord v. Harmon*,⁴ which involved the submission of a dispute concerning wages to the federal Regional Labor Board. In Washington the arbitration statute is held to be exclusive and, unlike all the other statutes,⁵ to have taken the place of common law arbitration.⁶ Nevertheless, the court upheld the award of the Board in the Gord case, upon the theory that the submission was an appraisal and not an arbitration.

Section 179. Commercial Arbitration Compared with and Distinguished from the Arbitration of Labor Disputes.

The arbitration of labor disputes pursuant to arbitration clauses contained in collective bargaining agreements is increasingly becoming indistinguishable from the arbitration of controversies generally. Indeed, there is no essen-

1. See *People v. Lindsey*, 86 Colo (1937).

458, 283 P 539 (1920); 40 CJ 625

2. See *infra*, section 457.

3. *Williston on Contracts* (Rev Ed), section 1921A.

4. 188 Wash 134, 61 P(2d) 1294

5. *Williston on Contracts* (Rev Ed), section 1919.

6. *Puget Sound Bridge, etc., Co. v. Frye*, 142 Wash 166, 252 P 546 (1927).

tial difficulty in the way of developing arbitration in connection with collective bargaining agreements along lines and in accordance with rules similar to those relating to commercial arbitration. Nevertheless it cannot be denied that there remain several points of distinction between commercial and industrial arbitration which need to be appreciated if the sentiments which find expression in the field of arbitration are adequately to be understood. Whether these distinctions are vestigial, or whether, on the other hand, they represent points of differences reflecting either labor's viewpoints or peculiarities resulting from administrative difficulties, is a question which does not yet permit of a single answer.

The kernel of the distinction between commercial and industrial arbitration is said to be found in the fact that commercial arbitration is an aspect of the administration of justice, and, more particularly, a substitute for the judicial process,⁷ while the arbitration of labor disputes is more often an extension of the process of collective bargaining.⁸ Hence, partisan arbitrators, condemned in connection with commercial arbitration,⁹ are commonly found

7. "The purpose of arbitration is essentially an escape from judicial trial." *Kranas Bros Lum Co. v. Bosert*, 62 F(2d) 1004, 1005 (CCA 2, 1933)

8. See Phillips, *The Function of Arbitration in Industrial Disputes* (1933), 33 Col L Rev 1366.

9. "... the practice of arbitrators of conducting themselves as champions of their nominators is to be condemned as contrary to the purpose of arbitration and as calculated to bring the system of enforced arbitrations into disrepute. An arbitrator acts in a quasi-judicial capacity and should possess the judicial qualifications of fairness to both parties so that he may render a faithful, honest and disinterested opinion. He is not an advocate whose function is to convince the umpire or third arbi-

trator. He should keep his own counsel and not run to his nominator for advice when he sees that he may be in the minority. When once he enters into an arbitration he ceases to act as the agent of the party who appoints him. He must lay aside all bias and approach the case with a mind open to conviction and without regard to his previously formed opinions as to the merits of the party or the cause. He should sedulously refrain from any conduct which might justify even the inference that either party is the special recipient of his solicitude or favor. The oath of the arbitrators is the rule and guide of their conduct." In the *Matter of American Eagle Fire Ins. Co. v. New Jersey Insurance Co.* 240 NY 398, 148 NE 562 (1925). It might be added that technically conceived arbitration

sitting in judgment upon the merits of respective contentions of the parties to a labor dispute.¹⁰ So also, justice and not compromise is said to be the goal of the commercial arbitrator, the procedure of arbitration differing from the judicial process only in the celerity and the informality of the former.¹¹ Compromise, on the other hand, and not justice unconcerned with consequences related to the situations of the respective parties, is often the purpose of industrial arbitration.¹² In *Simon v. Stag Laundry, Inc.*¹³ there is revealed what would seem to be an instance of the confusion of the process of arbitration with that of compromise and conciliation. The arbitration clause in the agreement in that case included the provision that "In the event that a discharge is determined by the Impartial Chairman to have been wrongfully effected, such discharged employee shall be immediately reinstated." One Gingold was discharged, the union asserting the discharge

is inconsistent with the practice of having each of the parties name an arbitrator, the third arbitrator being chosen by the two thus nominated. The practice of selecting arbitrators from a panel of arbitrators known to neither party to the controversy comports better to the exercise of the judicial function of the arbitrator.

10 See Phillips, *The Function of Arbitration in Industrial Disputes* (1933), 33 Col L Rev 1366; Isaacs, *Two Views of Commercial Arbitration* (1927), 40 Harv L Rev 920.

11. "When the parties refer a controversy to an arbitrator, to be adjudicated under the prevailing arbitration law, they contemplate, and have a right to expect, a decision which determines their respective claims on the basis of the evidence submitted. An arbitrator misuses his powers and takes an unfair advantage of the parties when, unapproached by them, he tries to persuade or force parties to compromise

or settle their controversy. Had they preferred this procedure, the parties would have selected a mediator or conciliator. It is the privilege of the parties voluntarily to effect a settlement of their controversy during the arbitration proceeding and to withdraw the case or to ask the arbitrator to give it the status of an award. It is not, however, the privilege of the arbitrator to participate in making such a settlement and he may, with entire respect for the obligations of his office, decline to give such a settlement the stamp of his approval as an award." *The American Arbitrator and his Office*, p 18, published by the American Arbitration Association.

12. See Phillips, *The Function of Arbitration in Industrial Disputes* (1933), 33 Col L Rev 1366. Oliver, *The Arbitration of Labor Disputes* (1934), 83 U of Pa L Rev 206.

13. 259 AD 108, 18 NYS(2d) 197 (1940).

was without cause, the appellant asserting that it was for dishonesty. The controversy was referred to an Impartial Chairman who made an award directing the employee to be reinstated on probation with loss of pay for four weeks, the Impartial Chairman adding to the award a warning to all routemen to the effect that they would be held strictly accountable for any act of irregularity and be subject to discharge for any such act. The Supreme Court confirmed the award, but the Appellate Division reversed, holding that "The award should be vacated and the controversy should be remitted to the Impartial Chairman for disposition in accordance with the terms of the arbitration agreement."¹⁴ The court said, in supporting its reversal of the holding of the court below, that "We are unable to agree with the respondent's claim that the award made necessarily implies that the Impartial Chairman found that the discharge was justified. The fact that the arbitrator imposed a loss of four weeks' pay leads to no other conclusion than that the discharge was not wrongfully effected."

Again, industrial arbitration is more usually spoken of in connection with the adjustment of existing labor controversies, while commercial arbitration is said more often to include the disposition of controversies which may arise in the future out of agreements between the parties. Then too, industrial arbitration may involve the extension of an existing agreement, or the making of a new one, or in general the creation of new obligations or modifications of old ones, while commercial arbitration generally concerns itself with interpretation of existing obligations and disputes relating to existing agreements.¹⁵

14. Dore, J., dissented upon the ground that "inherent in the determination that the employee be reinstated is a finding that the discharge was wrongful."

15. See, for example, *infra*, section 180. See also Phillips, *The Function of Arbitration in Industrial Disputes* (1933), 33 Col L Rev 1366. "For in labor disputes, as distinguished from commercial arbitra-

tions, there are two entirely different kinds of arbitrations. One form—the 'specific'—arises when a controversy results from the interpretation of the carrying out of an agreement dealing with wages, hours and discharges; the other—the 'general'—when an attempt is made to resolve a dispute as to what the wages or conditions of work shall be in the future; in essence, it is the formula-

In a number of states, statutes dealing with the adjustment of labor controversies have been enacted.¹⁶ Their application is limited to the settlement of existing disputes, they find their source not so much in thoughts intended to implement the administration of justice, but rather in public policy designed to keep the peace, and they are generally hybrids of conciliation and mediation. Although they are often called "arbitration statutes," they are not the equivalent of arbitration machinery as the term "arbitration" is properly employed. That labor's viewpoint, for example, is included within the framework of such statutes is evidenced by the fact that under most of the statutes, labor organizations are given the right to participate in the selection of membership of the boards or commissions created to deal with labor disputes,¹⁷ or are privileged to have a member on such boards or commissions.¹⁸ Compromise by contending advocates rather than justice by impartial men is thus the purpose of the procedure adopted under such statutes.

tion of a new agreement between the parties" Fraenkel, *Recent Developments in the Arbitration of Labor Disputes* (1940), 17 NYULQ Rev 549, 550-551

16. See *infra*, sections 457, 458

17. *Alabama*.—Acts 1911, p 320, section 6

Alaska.—Comp L 1933, section 2212

Idaho.—Rev Code 1909, sections 1430, 1431.

Indiana.—See Burns Stats Ann. 1933, sections 40-1901 to 40-1910.

Iowa.—Acts 1939, section 1497.

Louisiana.—Rev Stats 1897, Act No 139, Acts of 1894, section 1.

Minnesota.—Rev Laws 1905, section 1828

Nebraska.—Rev Stats 1913, section 3638.

Nevada.—Rev L 1912, section 1930.

Texas.—Rev Civ Stats 1911, art 71.

18. *Connecticut*.—Gen Stats 1902,

section 4708

Idaho.—Rev Code 1909, section 1427.

Illinois.—Rev Stats 1931 (Smith Hurd) c 10, section 19

Indiana.—See Burns Stats Ann 1933, sections 40-1901 to 40-1910.

Maine.—Rev Stats 1930, c 6, section 829

Massachusetts.—See Ann L 1933, c 150, sections 1-10.

Missouri.—Rev Stats 1909, section 7802

Montana.—Rev Code 1907, sections 1670, 1671

Nebraska.—Rev Stats 1913, section 3633

New Hampshire.—Acts 1911, c. 198, section 3, am. by Acts of 1913, c. 186

South Carolina.—Act No 545, 1916, section 8.

Utah.—Comp L 1907, section 1324

Vermont.—Acts 1912, Act No 190, section 1.

Finally, and as will be more fully discussed in the following section, a number of commercial arbitration statutes except collective bargaining agreements from their purview. Fear in labor circles that statutes designed to compel arbitration, though depending upon voluntary agreement to arbitrate, would contain ingredients of compulsory arbitration of labor disputes, induced the making of such exceptions.¹⁹

The several distinctions thus drawn between commercial and industrial arbitration are not meant to constitute a criticism of one or the other. There are no doubt fields of labor controversies susceptible of successful application of the procedure of commercial arbitration, and the extension of such procedure to include, indistinguishably from other disputes, the arbitration of labor disputes. Thus, the interpretation of collective bargaining agreements clearly fits into the framework of arbitration in general. Questions or disputes concerned, however, with such things as wages and hours or the revision thereof from time to time, are not so plainly problems which are capable of impartial resolution. That agreements to arbitrate or adjust controversies or disputes of whatever kind between capital and labor should, when once entered into, be enforced at law or in equity, is beyond cavil.²⁰ But there is room for argument whether the process of collective bargaining, like the collective bargaining agreement, can desirably be fitted into the procedure of commercial arbitration, or whether, on the other hand, we need new patterns of settlement machinery.²¹

19. See Phillips, *Paradox of Arbitration Law. Compulsion as Applied to a Voluntary Proceeding* (1932), 46 Harv L Rev 1256.

20. See *infra*, section 180.

21. See, for a statement of the sui generis nature of collective bargaining agreements, *supra*, sections 155, 172.

In general, substitution of arbitration for the procedure of judicial machinery involves a choice between

competing advantages. "In deciding whether or not to advise his client to arbitrate, the lawyer should consider its disadvantages as well as advantages. Arbitration is of doubtful value when the facts are so complicated that they cannot be easily carried in mind or when intricate and important questions of law, which it might be desired to refer to the higher courts, play a large part in the dispute. In the average run of

Section 180. Arbitration Statutes.

At common law agreements both to arbitrate a dispute arising in the future and to arbitrate an existing controversy were revocable at the will of either of the parties thereto,²² and were not capable in equity of specific enforcement,²³ to the extent that, since only nominal damages could be recovered for wrongful revocation,²⁴ such agreements were worthless guarantees against the necessity for recourse to the traditional judicial process. Arbitration statutes, which have more or less done away with the common law rule, have been enacted by the federal government and in every state except Oklahoma and South Dakota,²⁵ but

cases, however, particularly in fields where a knowledge of technical conditions or trade practices is important in arriving at a just decision, or where speedy action is essential, as in seasonal trade, arbitration offers many advantages over litigation. By way of illustration and suggestion and without attempting to make a complete list, we may say that arbitration has been found satisfactory in disputes involving partnership dissolutions, valuations of stock in closely held corporations and disagreements among the principals in such corporations, valuation of real estate and other property, breach of warranty of quality of merchandise, contract defaults in general in ordinary trade or commercial contracts, accounts, where figures can best be determined by expert accountants, disputes involving trade practices or other technical matters calling for expert knowledge or skill, and claims for property damage and personal injuries, especially where the amount involved is not large." *An Outline of Arbitration Procedure* (1938), pp. 10-11. Prepared by Committee on Arbitration, The Association of the Bar of the City of New York. See also Phillips, *The Function of Arbitration in Industrial*

Disputes (1933), 33 Col L Rev 1366. C/f Isaacs, *The Implementing of Industrial Arbitration* (1940), 17 NYU LQ Rev 564.

22. *Cocalis v. Nazlides*, 308 Ill 152, 139 NE 95 (1923); *Boston & L. R. Corp v. Nashua & L. R. Corp.* 139 Mass 463, 31 NE 751 (1885); *Knaus v. Jenkins*, 40 NJL 288, 29 Am. Rep. 237 (1878).

23. *Rowe v. Williams*, 97 Mass 163 (1867); *March v. Eastern R. Co.* 40 NH 548, 77 Am Dec 732 (1860); *Hurst v. Litchfield*, 39 NY 377 (1868), *Hayes*, *Specific Performance of Contracts for Arbitration or Valuation* (1916), 1 Corn LQ 225.

24. *Aktieselskabet, etc., Kompagniet v. Rederiaktiebolaget Atlanten*, 250 F 935, 163 CCA 185 (CCA 2, 1918), *aff'd sub nom The Atlantan*, 252 US 313, 40 S Ct 332, 64 L Ed 586 (1920); *Williston on Contracts* (Rev Ed), section 1927A.

25. See *Sturges*, *Commercial Arbitrations and Awards*, sections 88-142 "Except in the state of Washington, it is still possible to have a common law arbitration despite the passage of the modern acts providing for statutory arbitration. The practical value of the preservation of common law arbitration is that if the agreement fails to comply with the terms

while submissions of existing controversies are capable of specific enforcement in all the states,²⁶ arbitration clauses in connection with agreements which are designed to provide for the machinery for the settlement of disputes arising in the future (and which, as concerns collective bargaining, is the much more important aspect of arbitration) are capable of specific enforcement only under the United States Arbitration Act, and by the Acts of the thirteen states²⁷ which have enacted more or less substantially the Draft State Arbitration Act, suggested by the American Arbitration Association. Three methods of enforcement are provided for by the Act: (1) an order compelling arbitration; (2) an order staying actions brought in violation of the agreement; (3) an order appointing arbitrators who are authorized to proceed with the arbitration.

As indicated in the preceding section, the arbitration statutes considered in the instant section should not be confused with the so-called labor arbitration statutes in effect in a number of states,²⁸ which provide methods for the adjustment of controversies between capital and labor but which are in no sense "arbitration" statutes as the term "arbitration" is technically employed.

In addition, commercial arbitration statutes in some of the states exempt collective bargaining agreements from their terms, thereby further digressing commercial arbitration from the arbitration of labor disputes.²⁹ A statement

of the statute for some technical reason, it will generally be given effect as a common law arbitration" Williston on Contracts (Rev Ed), section 1919.

26. See Sturges, *Commercial Arbitrations and Awards*, sections 88-142.

27. Arizona, California, Connecticut, Louisiana, Massachusetts, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Wisconsin. See Sturges, *Commercial Arbitrations and Awards*, sections 88-142.

28. See *infra*, sections 457-458.

29. Under the laws of the follow-

ing states, collective bargaining agreements are treated differently (to an extent discussed in the text) from other agreements.

Arizona.—Session Laws, 1929, c. 72.

California.—Code Civ Practice, section 1280.

New Hampshire.—L 1929, c. 147.

Ohio.—4 Page's Ann. Code, section 12148.1.

Oregon.—Ann. Code 1930, sections 21-101 to 21-103, as am. by L. 1931, c. 38.

Pennsylvania. — Purdon's Stats. Ann. Title 5, section 161.

of the extent of such exclusion of collective bargaining agreements from arbitration statutes will indicate the limitations upon effective industrial arbitration in the respective states.

Arizona. The proviso to the arbitration statute excepts from its operation "collective contracts between employers and employees, or between employers and associations of employees, in respect to terms or conditions of employment." In *Gates v. Arizona Brewing Co.*,³⁰ it was accordingly held by the Arizona Supreme Court that a collective bargaining agreement could not claim the benefit of the statute.

California. Notwithstanding that the statute excepts contracts "pertaining to labor" from its purview, it has been held that collective bargaining agreements are not excluded from the statute.³¹

New Hampshire. "Collective contracts between employers and employees, or between employers and associations of employees in respect to terms or conditions of employment" are excepted from the New Hampshire arbitration statute.

Ohio. The Ohio statute provides that "The provisions of this act shall not apply to (a) collective or individual contracts between employers and employees in respect to terms or conditions of employment. . . ."

Oregon. A 1931 amendment to the Oregon statute governing arbitration and award excepted from the benefit of the statute a "controversy, suit or quarrel" respecting "terms or conditions of employment under collective contracts between employers and employees or between employers and associations of employees. . . ."

Pennsylvania. The Pennsylvania law excepts from its application "a contract for personal services" and the constitutionality of the exception has been sustained as against

Rhode Island.—L. 1936, c. 475, section 1.

Wisconsin. — Code 1939, section 298.01.

30. 95 P(2d) 49 (Ariz 1939).

31. *Levy v Shann.* — Cal —, — P(2d) — (1940). C/f *Pacific Indemnity Co. v. Ins. Co. of No. America*, 25 F(2d) 930 (CCA 9, 1928).

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the contention that the basis of classification was improper.²² It has been held that the exception does not apply to collective bargaining agreements, the court saying: "The contract is not confined to the usual relationships between master and servant, but has a much wider and broader scope, being a collective bargaining agreement intended to fix certain rights and obligations between the two groups mentioned, one the group of employers and the other the group of employees, for their mutual interests. It is not a direct personal service contract within the contemplation of the exception in the act."²³

Rhode Island. The statute governing the validity and enforceability of arbitration agreements provides that "the provisions of this chapter shall not apply to collective contracts between employers and employees, or between employers and associations of employees, in respect to terms or conditions of employment."

Wisconsin. The arbitration statute is declared inapplicable "to contracts between employers and employees, or between employers and associations of employees, except as provided in section 111.10 of the statutes." Section 111.10, which is part of the State Labor Relations Act (known as the Employment Peace Act) provides that "Parties to a labor dispute may agree in writing to have the board act or name arbitrators in all or any part of such dispute, and thereupon the board shall have the power so to act. The board shall appoint as arbitrators only competent, impartial and disinterested persons. Proceedings in any such arbitration shall be as provided in chapter 298 of the statutes" (chapter 298 deals with arbitration generally).

Section 181. Requirement of Justiciable Controversy.

Application of general commercial arbitration statutes to

22. *Katakura & Co. Ltd. v. Vogue Silk Hosiery Co.* 15 Pa D & C 389 (1931).

23. *Kaplan v. Bogrier*, 12 Pa D & C 693, 696 (1927). In *Goldstein v. I.L.G.W.U.* 328 Pa 385, 196 A 43 (1938) the court assumed *arguendo* 542

that the Act was applicable, notwithstanding the exception of personal service contracts, to collective bargaining agreements. *C/f Callender, Pennsylvania Arbitration Act Ineffective in Labor Disputes* (1938), 2 Arb J 193.

cases involving the arbitration of labor disputes has revealed, in the case of *In re Buffalo & Erie Ry. Company*,³⁴ a serious obstacle to the effective operation of settlement machinery in connection with industrial controversies. In that case, the collective bargaining agreement between the parties provided for change of its provisions by mutual agreement, in the absence of which agreement the dispute concerning such change or changes was to be submitted to arbitration. The railway company, desiring a 10% reduction in wages in the light of economic conditions, requested such a change in the agreement, and upon the union's refusal to accede to the request, the matter was referred to two arbitrators who failed, however, to agree upon a third pursuant to the agreement, whereupon an application was made at Special Term for the appointment of a third arbitrator, pursuant to Section 4 of the New York Arbitration Law. The application was granted at Special Term, and the decision affirmed by the Appellate Division, but the Court of Appeals reversed, holding that the controversy was not justiciable under the Arbitration Law. "Arbitrators," said the Court, "under the Arbitration Law deal with the same kinds of controversies that are dealt with by the courts." Then the court added: "No power exists in the courts to make contracts for people. They must make their own contracts. The courts reach their limit of power when they enforce contracts which parties have made. A contract that the court shall determine what an agreement shall be for the future is unenforceable, unless the lines of the agreement have been laid out by the parties."³⁵

In view of the intimate connection of collective bargaining agreements with prevailing economic circumstances, and the consequent necessity for constant revision of the terms of such agreements to meet the contingencies of changing conditions, it can readily be seen that any rule denying specific enforcement to a provision whereby such

34. 250 NY 275, 165 NE 201 (1929).

35. See, for a later New York Court of Appeals holding in accord

with the *Buffalo & Erie Ry. Company* case, *Matter of Amsterdam Dispatch Co., Inc.* 278 NY 688, 16 NE(2d) 403 (1938).

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constant revision might be effected, constitutes a bar to the operation of an important aspect of labor disputes arbitration.³⁶ It goes without saying, as stated by a Pennsylvania court in connection with the first case instituted in that state by a labor union for the enforcement of an arbitration award under a collective bargaining agreement, that "It is in the public interest that labor be encouraged to resort to legal process to redress its grievances rather than to those direct methods which have so strong a tendency to disturb the public peace and order."³⁷

The Erie case is no longer the law in New York, having been legislated out of present validity by amendment in 1940 to the New York Arbitration Law,³⁸ but in other states the rationale of the Erie case may constitute an obstacle which ought to be removed if the peaceful adjustment of labor disputes within the framework of the collective bargaining agreement is to be encouraged.³⁹

36. See Fraenkel, *The Legal Enforceability of Agreements to Arbitrate Labor Disputes* (1937), 1 Arb J 360.

37. *I.L.G.W.U. v Goldstein & Levin*, 1 LRR 8, p. 21. Noted in 2 Arb J 92-94 (1938). The quoted language is from the opinion of the court of common pleas. The Supreme Court of Pennsylvania reversed the holding of the lower court in 328 Pa 385, 196 A 43 (1938) upon the grounds that, under the arbitration statute, (1) the court had no authority to issue an injunction predicated upon the arbitrator's award (see *infra*, section 184), and (2) the making of the agreement having been put in issue, the defendants had the right to preliminary judicial determination of that issue. See, for a discussion of the case, *Callender, Pennsylvania Arbitration Act Ineffective in Labor Disputes*, 2 Arb J 193 (1938).

38. New York Civil Practice Act, section 1448. The amendment provides as follows: "A provision in a

written contract between a labor organization, as defined in subdivision five of section seven hundred one of the Labor Law, and employer or employers or association or group of employers to settle by arbitration a controversy or controversies thereafter arising between the parties to the contract including but not restricted to controversies dealing with rates of pay, wages, hours of employment, or other terms and conditions of employment of any employee or employees of such employer or employers shall likewise be valid, enforceable and irrevocable, save upon such grounds as exist at law or in equity for the revocation of any contract."

39. It is to be noted, however, that the Erie case was decided under the requirement of the New York Act, that the controversy be "subject to civil action."

It has been ingeniously suggested that the Erie case and its implications might be obviated by use of a clause whereby the parties appoint

Section 182. Strike in Violation of Agreement Containing Arbitration Clause.

In *Shop 'N Save v. Retail Food Clerks Union*,⁴⁰ it was held that strikes in violation of terms contained in collective bargaining agreements are illegal where such agreements contain conclusive arbitration clauses, and this though the arbitration clauses are unenforceable by resort to the courts. ". . . Many collective bargaining contracts contain provisions for conclusive arbitration, and whether, in this state, such provisions may be enforced by court process or not, they are the lawful, deliberate and presumably good faith acts and promises of both parties, and in good conscience and in equity binding on both," said the court. "Such a provision for arbitration of controversies in a collective bargaining contract," the court continued, "contains an implied promise not to strike and use economic pressure to force agreement with labor's demands. Hence a repudiation of a voluntary arbitration agreement followed by a strike and picketing is an unjustifiable breach of contract even though such arbitration proceedings cannot be compelled or enforced by court process under state law."⁴¹

The nature of the obligation to attempt a settlement of the controversy, imposed by anti-injunction acts as a condition to injunctive relief against unlawful labor activity, is considered at a later point in this work.⁴² At common

an agent, specify the time during which he is authorized to act, and provide that, in the event either of the parties revoke the agency, then the demand of the other party shall become operative, as though the parties had by mutual agreement determined upon the demand. Lieberman, *The Collective Labor Agreement* (1939), p. 41. The difficulty however, with this suggestion is that the courts might construe the consequence of revocation to constitute an illegal penalty and not the equiv-

alent of damages for the wrongful termination of an agency.

40. — Cal —, — P(2d) — (1940).

41. See, for the legality of strikes, picketing or boycotts in breach of collective bargaining agreement, *supra*, section 163. For the question whether such labor activity constitutes a "labor dispute" under the Norris Act or prototype state anti-injunction legislation, see *supra*, section 177. Construction of collective bargaining is considered *supra*, at section 169.

42. See *infra*, section 221.

law, the refusal by an employer to submit differences to arbitration does not operate to bar equitable relief against illegal labor activity,⁴³ upon the ground that any other rule would have the effect of compelling, by judicial decision, resort to arbitration.⁴⁴ In *Vaughan v. Kansas City Moving Picture Operators' Union*,⁴⁵ where a blanket injunction was entered because of violence in connection with the past exercise of the labor activity, the court indicated that the injunction was entered partly because the union had refused to meet with the employer in connection with one of the issues involved in the dispute. And in *Winter v. Lefkowitz*,⁴⁶ it was said that an action to enjoin a strike because violative of a collective bargaining agreement might be defeated by evidence showing that the employer had theretofore refused to arbitrate pursuant to the arbitration clause contained in the agreement, and a showing further that the strike resulted from such refusal to arbitrate.

It has been held that a strike called in violation of an agreement containing an arbitration clause operates as a waiver by the union of its right thereafter to compel arbitration.⁴⁷ The court said: "The petitioner may not in-

43. *Thomson Mach Co v. Brown*, 89 NJ Eq 326, 108 A 129 (1918); *Berg Auto Trunk & Specialty Co. v Wiener*, 121 Misc 796, 200 NYS 745 (1923).

44. *Berg Auto Trunk & Specialty Co. v. Wiener*, 121 Misc 796, 200 NYS 745 (1923).

45. 36 F(2d) 78 (DCWD Mo 1929).

46. NYLJ, May 24, 1938, p. 2518.

47. In re *Agressa*, 3 LRR No 19, p. 18; *S Ct NY Co. per Hofstadter, J.* See *Unecda Credit Clothing Stores, Inc. v. Briskin*, 14 NYS(2d) 964 (1939). But see, holding contra *Weissman v. Melba Dress Co. Inc.* NYLJ March 2, 1939, *S Ct NY Co., per Noonan, J.*: "If the respondent claimed damages because of the stoppages, it could have availed itself of the arbitration process in the collective agreement. This could have

been done at the time the question of non-payment of taxes was heard by the arbitrator. . . . Even if the United Association of Dress Manufacturers, Inc. violated the collective agreement . . . such violation should not affect the rights and remedies of the petitioners." The cases can be reconciled by invoking the rule, well settled in the law of contracts, that repudiation by one party to an agreement, is an offer to terminate the same which the other may but need not accept.

The making of a complaint to the National Labor Relations Board upon the same charge as that concerning which a motion is made to compel arbitration does not constitute a waiver of the right to resort to arbitration. *Steel Workers Organizing Committee v. Art Steel Co. Inc.* NY [1 Teller]

voke an arbitration clause which it has violated to stay a pending action and to compel arbitration. The agreement between the parties specifically provides that 'pending the decision of the arbitration board, there shall be no strike, lockout or stoppage of work.' The petitioner does not deny that it engaged in strike activities without first resorting to arbitration and such action operates as an election to waive and abandon the right to arbitrate afforded by the contract."

Section 183. Interpretation of Arbitration Clauses; Limited and Unlimited Clauses.

The nature and extent of the matters covered by the given arbitration clause determine the corresponding arbitrable matters. A general arbitration clause, such as that suggested by the American Arbitration Association, which provides that "Any controversy or claim arising out of or relating to this contract shall be settled by arbitration" obviously confers broad scope upon the arbitrator's powers.⁴⁸ On the other hand, in a number of cases the courts have passed upon arbitration clauses which were more limited in scope, and have held the arbitrator's powers to be correspondingly limited.⁴⁹ Thus in *Marchant*

LJ p 1514, April 3, 1939, S Ct NY Co., per McLaughlin, J.

48. See *Matter of Dubin & Pincus, Inc.*, NYLJ, November 10, 1938, p. 1563, S Ct NY Co., per Church, J., holding that a motion to vacate an award because the arbitrator not only decided the issue but also assessed damages will be denied, where no such limitation is placed upon the arbitrator's authority in the contract. See also *Matter of Pierce v Brown Buick Co.* 256 AD 1076, 11 NYS(2d) 100 (1939) leave to appeal den 280 NY 852, 21 NE(2d) 220 (1939); *In re Raskin*, 4 LRR No. 26, p. 22 (NYS Ct, per Hammer, J., August 28, 1939).

49. "Parties to a contract may agree, if they will, that any and all

controversies growing out of it in any way shall be submitted to arbitration. If they do, the courts of New York will give effect to their intention. A submission so phrased, or in form substantially equivalent, does not limit the authority of the arbitrators to an adjudication of the breach. . . . There is nothing in the law, however, that exacts a submission so sweepingly inclusive. The question is one of intention, to be ascertained by the same tests that are applied to contracts generally. Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a du

v. Mead Morrison Mfg. Co.,⁵⁰ the arbitration clause extended to "any controversy or difference of opinion (which) shall arise as to the construction of the terms and conditions of the contract, or as to its performance, . . ." It was held that the fixing of consequential damages for the breach of contract by one of the parties thereto was a departure from the submission as determined by the scope of the clause, and was void.⁵¹

Form of Limited Arbitration Clause

The arbitrators shall not have the right to impose upon the (parties) any obligation not expressly assumed hereunder, or in violation of any of the express (or implied) provisions of this agreement, nor shall such arbitrators have the right to deprive the (parties) of any right expressly or impliedly reserved herein.

ly to resort to these conventional tribunals, however helpful their processes, except to the extent that he has signified his willingness. Our own favor or disfavor of the cause of arbitration is not to count as a factor in the appraisal of the thoughts of others." Cardozo, C. J., in *Marchant v. Mead-Morrison Mfg Co.*, 252 NY 284, 169 NE 388 (1929).

"If the arbitrators exceed their authority the award is void to that extent, and if the part which is void cannot be separated from the rest without injustice, the whole award is void." 6 Williston on Contracts (Rev Ed) section 1929, citing *Reynolds v. Reynolds*, 15 Ala 398 (1849), *Brown v. Mize*, 119 Ala 10, 24 S 453 (1898); *Snead & Co. Iron Works v. Merchants' Loan & Tr. Co.* 225 Ill 442, 80 NE 237, 9 LRA(NS) 1007 (1907); *Jones v. Bishop*, 218 Ill App 318 (1920), *Bogard v. Boone*, 200 Ky 572, 255 SW 112 (1923), *Oreutt v. Butler*, 42 Me 83 (1856); *Skilling v. Coolidge*, 14 Mass 43 (1817); *Yeaton v. Brown*, 52 NH 14 (1872); *Gibson v. Powell*, 13 Miss 712; *Cox v. Jagger*, 2 Cow(NY) 638, 14 Am Dec 522 (1824); *Clark Millinery Co. v. Na-*

tional Union F Ins Co. 160 NC 130, 75 SE 944, Ann Cas 1914C 367 (1912); *Scott v. Barnes*, 7 Pa 134.

For cases where the unauthorized award was held to invalidate the award as a whole, see *Polk v. Cleveland R Co* 20 Ohio App 317, 151 NE 808 (1925), *Evans v. De Spain*, 37 SW(2d) 231 (Tex Civ App 1930). See *Schoolnick v. Finman*, 108 Conn 478, 144 A 41 (1928).

For cases, on the other hand which hold that the unauthorized portion is severable, see *Marchant v. Mead-Morrison Mfg Co* 252 NY 284, 169 NE 388 (1929); *Geiger v. Caldwell*, 184 NC 387, 114 SE 497 (1922); 6 Williston on Contracts (Rev Ed), section 1929n.

In general, the arbitrator must follow the authority conferred by the agreement, and again, must be bound by the limitations which such authority confers upon him. 6 Williston on Contracts (Rev Ed) section 1929. 50. 252 NY 284, 169 NE 388 (1929).

51. See also *Lehman v. Ostrovsky*, 264 NY 130, 190 NE 208 (1934); *Smith Fireproof Const. Co. v. Thompson-Starratt Co.* 247 NY 277, 160 NE

Section 184. Scope of Award; Specific Remedies.

As has been seen in the preceding section, the scope of the arbitrator's award is limited by the authority gathered from the language of the arbitration agreement. The arbitrator is also limited in the scope of his award by the court order under which he is appointed, where this is the manner of the arbitrator's appointment, and in such event not the provisions of the agreement but the language contained in the order determines the scope of the arbitrator's powers⁵² A further question, to which there are yet but few answers, is whether specific remedies may be predicated upon the arbitrator's award. In a Pennsylvania case, *Goldstein v. International Ladies Garment Workers' Union*,⁵³ it was held that equitable enforcement of arbitration awards was impossible because the arbitration statute provided for enforcement of awards as judgments at law. The holding is strict construction. In a New York case,⁵⁴ on the other hand, the contrary was held. In the last case, the agreement to arbitrate was ancillary to a contract under the terms of which the employer undertook to employ union labor only. The employer was found to have breached the contract, and the arbitrator directed the employer to abide by its terms. The respondent contended that "The judgment of the court will take the form of a mandatory injunction and that such a judgment cannot be founded on facts found by arbitration." The court replied: "That is not the rule to be followed. *Susquehanna S. S. Co. v. A. O. Andersen & Co.*, 239 NY 285, 146 NE 381 (1925) disposes of that contention.

369 (1928). *General Footwear Corp. v. Lawrence Leather Co.* 252 NY 577, 170 NE 149 (1929). *Strange v. Thompson-Starrett Co.* 261 NY 37, 184 NE 485 (1933).

An application to compel arbitration will be denied, under an agreement which provides that differences which "cannot be adjusted by the representatives of the Union and of the Company shall be submitted to arbitration" where there is no proof that the respondent availed itself of

the adjustment machinery provided for in the contract and plainly stated as a method of settlement to be employed prior to the employment of arbitration. *In re Basile*, 170 Misc 837, 10 NYS(2d) 24 (1938).

⁵² See *Strange v. Thompson-Starrett Co.* 261 NY 37, 184 NE 485 (1933).

⁵³ 328 Pa 385, 196 A 43 (1938).

⁵⁴ *Matter of Albert*, 160 Misc 237, 288 NYS 933 (1936).

It was there shown that a tribunal wholly without equity power could fix the facts, so that a court of equity would have nothing to do but decide whether equitable relief should be granted. The arbitrator here does not grant an injunction. This court does, upon facts found by a tribunal without equity jurisdiction."

Section 185. Control by Contract over the Procedure and Cost of Arbitration.

Both procedural aspects and the cost of arbitration need to be regulated by contract, if the parties are to be insured predictable methods and consequences in connection with the arbitration process.⁵⁵

RULES OF THE AMERICAN ARBITRATION ASSOCIATION FOR THE VOLUNTARY INDUSTRIAL ARBITRATION TRIBUNAL⁵⁶

The following Rules of Procedure are promulgated by the Administrative Council of the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association this twentieth day of October, 1937, and are in effect on that date:

55. See 6 Williston on Contracts (Rev Ed), sections 1296, 1296A; Fraenkel, *Procedural Aspects of Arbitration* (1934), 83 U Pa L Rev 226; Phillips, *A Lawyer's Approach to Commercial Arbitration* (1934) 44 Yale L Jour 31, 45; *Arbitration Provisions in Labor Agreements*, 1 Arb J (1937), pp. 333-335

"Frequently no provision is made as to how many arbitrators are to sit, how and by whom they are to be chosen, whether they are to be paid and if so, by whom, what is to be done in the event of failure of one party to proceed with arbitration, a reasonable time limit on appointment of arbitrators and institution of proceedings, or for any other of the questions likely to arise in the course of arbitration. Such omissions often make it necessary to throw the case into litigation in the

end to settle some disputed point of procedure. . . .

"Many lawyers find it a convenience and insurance against mistakes to specify that the proceedings shall be conducted in accordance with the then prevailing rules of an organization with long experience in arbitration, such as the American Arbitration Association and the various Chambers of Commerce and trade associations." An outline of *Arbitration Procedure*, pp. 3, 4, Prepared by Committee on Arbitration, The Association of the Bar of the City of New York (1938).

56. See, for statutory recognition of the voluntary industrial arbitration tribunal of the American Arbitration Association, section 9 of the Minnesota State Labor Relations Act (Acts 1939, c. 440), which provides for arbitration of labor dis-

1. *Request for Arbitration.* Any party to an agreement containing an arbitration clause providing for arbitration under these Rules may initiate arbitration proceedings by notifying the other party of such intention and filing a copy of such notice, together with a statement of the dispute and a copy of the agreement, with the Arbitration Committee.

Parties to any existing labor dispute may initiate proceedings under these Rules by executing a submission agreement and filing a copy thereof with the Arbitration Committee.

Upon receipt of a copy of the notice or the submission agreement, and upon being satisfied that the remedies of negotiation, mediation or other conciliatory measures have failed or been exhausted, the Arbitration Committee shall forthwith proceed with arrangements for the arbitration.

2 *Statement of Dispute.* The notice of initiation of proceedings shall contain a statement of the dispute, and the party receiving such notice may file an answering statement with the Arbitration Committee, a copy of which shall be furnished the other party.

The Submission Agreement shall contain a statement of the matter in controversy.

No new or amended statement of the dispute may be considered by the arbitrators except by mutual agreement of the parties, or after a period of three days is allowed the other party to answer such amended or new statement of the dispute and provided that such statement is within the scope of the arbitration agreement.

3 *Appointment of Arbitrators.* If the arbitration agreement provides a method for appointing arbitrators, that method shall be followed. If the method so provided designates a period of time within which the arbitrators shall be named and either or both parties fail to do so, the Arbitration Committee shall appoint the arbitrator. If no period of time is specified, then a period of seven days shall be allowed.

If no method of appointment has been provided, and the parties are unable to agree upon a method, within a period of seven days, the method shall be as follows:

The Arbitration Committee shall submit to each party an identical list of names chosen from the members of the Tribunal, or as otherwise provided by the parties. Each party shall be requested to eliminate any names to which he objects and to return the list within a period of seven days from the date of mailing. From the names remaining upon the lists, the Arbitration Committee shall make the appointment. Upon the failure of either or both parties to return the lists within a period of seven days' time, or upon their failure to agree upon selections from the lists, the Arbitration Committee shall proceed to make the appointment. The Arbitration Committee shall determine the number of arbitrators

as follows: "Whenever a labor dispute arises which is not settled by conciliation [see sections 2, 8c, 8d] such dispute may, by written agreement of the parties, be submitted to arbitration on such terms as the parties may specify, including, among other methods, the arbitration

procedure under the terms of sections 9513 to 9519, inclusive, of Mason's Minnesota Statutes of 1927, and acts amendatory thereof and supplementary thereto, and arbitration under the Voluntary Industrial Arbitration Tribunal of the American Arbitration Association."

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whenever the arbitration agreement or the parties fail to do so. The registrar shall notify each arbitrator of his appointment and each party that the appointments have been made.

4. *Vacancies.* If any arbitrator should die, withdraw, or be unable, or refuse to perform the duties of his office or should he wilfully delay the proceedings with the intent to defeat the arbitration, the Arbitration Committee shall, on request of either party and on proof of the fact satisfactory to itself, declare the office vacant. Vacancies shall be filled in the same manner as the original appointment was made.

5. *Arrangements for Hearing.* When the Board of Arbitrators has been appointed, the time and place of the hearing shall be fixed by the arbitrators and a notice thereof, together with a copy of these Rules, shall be sent to the parties by the Registrar at least five days prior to the time set for the hearing. The Registrar shall make the arrangements necessary for taking a stenographic record when the parties so request and deposit such sums as the Registrar finds necessary to cover the expense thereof.

A party intending to be represented at the hearing by counsel shall notify the Registrar and the other party of that fact at least three days prior to the date set for the hearing.

Before proceeding with the hearing, each arbitrator, if so required under the prevailing arbitration law, shall take the oath of office in the prescribed form. If the prevailing arbitration law permits waiver of a prescribed oath, the parties may waive the oath pursuant to such law.

6. *Proceedings during the Hearing.* The order of the proceedings shall be as follows: The complaining party, or his counsel, shall present his case, call his witnesses and present his proofs, and then submit to questions and examination on the proofs presented. The defending party, or his counsel, shall then present his defense, call his witnesses and present his proofs, and then submit to questions and examination thereon. Exhibits offered by either party may be received by the arbitrators, and shall be made part of the record. Unless otherwise specified, all decisions of the arbitrators, including the making of the award, shall be by majority vote. The arbitrators shall maintain the privacy of the proceedings unless the parties mutually agree to the contrary.

7. *Evidence.* All proofs shall be taken in the presence of the parties, but the hearing may proceed in the absence of either party, if by his own fault, after due notice, he fails to be present or fails to obtain an adjournment. If it is deemed necessary by the arbitrators to make any independent inspection of the subject matter of the dispute, or to make any inquiries or obtain proof or information outside of the hearings, they may do so, provided, however, that opportunity is afforded the parties to examine any evidence so secured, unless such examination is waived in writing. The parties shall furnish such proofs as the arbitrators require whenever it is possible for them to do so; but when given authority by the prevailing arbitration law to subpoena witnesses or documents, the arbitrators may do so on their own initiative. The arbitrators may hear arguments by counsel and receive briefs and shall fix the time within which these shall be filed.

The arbitrators may, in their discretion, or shall, upon the demand of

either party, require parties or witnesses to testify under oath. When the parties shall have concluded the presentation of their proofs, the arbitrators shall close the hearings.

When the prevailing arbitration law permits the entry of a judgment on the award and it is the intention of the parties to rely upon such law for its enforcement, the provisions of that law shall be duly observed throughout the proceedings.

8. *Adjournments and Extensions or Reductions of Time* The arbitrators shall take adjournments on the request of a party for good cause shown and may take adjournments on their own initiative, but in no event shall they take such adjournments beyond the time set in the agreement for the making of the award. Extensions of time may be taken by mutual agreement of the parties or by the arbitrators when authorized by the parties to do so. The Arbitration Committee, upon the request of a party, or in its own discretion for cause satisfactory to itself, may reduce or extend the time limits provided in the Rules, except the time for making the award when fixed by the arbitration agreement.

9. *Optional Proceedings without a Hearing.* The parties, by mutual agreement, may dispense with the hearing and authorize the arbitrators to conduct the proceedings in the manner specified by the parties. When the parties shall fail to specify otherwise, the parties shall submit to the Registrar their respective claims in writing, including a statement of the facts and such written documents, abstracts from books of account or other proofs, properly verified, as the parties may wish to submit. These statements and proofs may be accompanied by written arguments by counsel and shall be submitted within a period of seven days from the date of the notice to file such statements. Each party shall have the right to examine the statements and proofs submitted by the other party and the Registrar shall forward such statements and proofs to the respective parties, each of whom may make one reply thereto. Upon the failure of any party to make such a reply within a period of seven days after receiving such statements or proofs, he shall be deemed to have waived the right to reply and the arbitrators shall thereupon proceed to their determination of the controversy.

10. *Award.* The award shall be made in writing and shall be rendered within 30 days after the closing of the proceeding or after the reference of the dispute to the arbitrators when there is no hearing. The award shall be signed by not less than a majority of the arbitrators and shall be filed with the Registrar who shall deliver or mail a true copy to each of the parties.

Any dispute between the parties as to the meaning or execution of the award may be resubmitted for interpretation to the arbitrators who made the award. If they cannot be reassembled, the Arbitration Committee may make such interpretation.

Although it is no part of the duty of the arbitrators to act as mediators during the proceedings, the arbitrators may, when notified that the parties have voluntarily effected a settlement, give such settlement the status of an award by stating the terms of the settlement in the form of an award and attaching their signatures thereto.

11. *Reconsideration of Award.* In the agreement the parties may re-

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serve the right to demand a reconsideration of the award. This demand, when exercised, shall set forth the facts upon which it is sought. An award may be reconsidered only on the ground of the discovery of new facts calculated to have a decisive effect on the award and which facts were unknown to the parties seeking revision or were non-existent at the time of the hearing. Upon proof of manifest error or false testimony or fraud, the arbitrators shall consider a revision of the award. If for any reason the arbitrators cannot be reassembled, the Arbitration Committee shall provide a method of revision, including the assembling of a new board of arbitrators, if the parties so request.

12. *Fees* The Arbitration Committee shall have authority to fix the administrative fees for each proceeding and to apportion their payment and time thereof by the parties; preferably on the basis of equal payments by each party. Arbitrators shall serve without compensation unless the parties, by special arrangement and with the consent of the Arbitration Committee, otherwise provide.

13. *Special Rules.* If the parties or the arbitrators deem special or additional rules to be necessary for a particular adjudication, the Arbitration Committee, upon the request of the parties or upon the Committee's own initiative, shall adopt special rules. These shall be applicable only to that particular controversy and shall not constitute amendments to these Rules.

14. *Application of Rules* By action of the Executive Committee of the Association, these Rules are deemed to be part of the General Rules of the American Arbitration Association and are applicable to industrial disputes unless the parties, by mutual agreement, indicate that the General Rules shall be in effect. The arbitrators shall interpret and apply these Rules in the manner best calculated to effect an adjudication of the dispute. Whenever differences concerning their interpretation arise which the arbitrators or the parties cannot resolve to the mutual satisfaction of the parties, the Arbitration Committee shall make the final decision.

Form: Clause Requiring Arbitrators to Make Findings of Fact⁵⁷

In each case submitted to arbitration, the arbitrators must make written findings, setting forth the reasons for their decision or award, and in connection with each case of dispute with respect to a wrongful discharge or layoff submitted, they shall make express written findings of fact and their conclusions based thereon, and the same shall be conditions precedent to any obligation on the part of the employer to reinstate a discharged employee, or to compensate him for lost wages.

57. It may sometimes be important to provide that arbitrators must make findings of fact in support of the decision. See, for a case where

the arbitrator's findings were held inconsistent with his award, *Simon v. Stag Laundry, Inc.* 259 AD 106, 18 NYS(2d) 197 (1940).

PART V

FEDERAL LABOR LEGISLATION

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Section 186. Federal Statutes Involved.

Federal legislation most outstandingly affecting labor activities is contained in four main statutes: The Sherman Act, the Clayton Act, the Norris Act and the National Labor Relations Act. The statutes have been stated in the order of their enactment. Of importance also are the labor provisions of the National Industrial Recovery Act, and the Railway Labor Act, and these two statutes will be considered within the framework of examination of the four main statutes. The many but relatively less important federal statutes affecting labor relations will be stated in subsequent sections.¹

1. The Interstate Commerce Acts and the statute prohibiting obstruction of the United States mails have heretofore been considered (see sections 50, 51) in connection with the general conception of legal sanctions applied to labor activity, because governmental concern over the channels of interstate commerce and the United States mails is not simply the re-

flection of legislation on the subject; the right of the United States to enjoin interferences with or obstructions of interstate commerce exists apart from any legislation, but results from the proprietary interest of the United States Government. See *In re Debs*, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895).

CHAPTER TWELVE

THE SHERMAN ANTI-TRUST ACT

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Section 187. Provisions of the Act.

The Sherman Anti-Trust Act (1890)² is the foundation statute of federal labor law. It declares illegal, contracts, combinations and conspiracies in restraint of trade and commerce. Violations of the Act render violators liable to the Federal government to injunction and criminal prosecution. Aggrieved private individuals possess the remedy of collecting treble damages from the wrongdoer.³ Sections 1, 4 and 7 of the Act set forth the kernel of its provisions:

"Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceed-

² Act of July 2d, 1890, c. 647, sec. 1, 26 Stat. 209, as am by Act of March 3d, 1911, c. 231, sec. 291, 36 Stat. 1167, 15 USCA sec. 1, 7, 15.

³ An action may not be commenced for both damages and injunc-

tive relief under the Act. Separate proceedings, one at law, the other in equity, must be commenced *Decorative Stone Company v. Building Trades Council*, 23 F(2d) 426 (CCA 2, 1928), cert. den. 277 US 594, 48 S Ct 530, 72 L Ed 1005 (1928).

ing one year, or by both said punishments, in the discretion of the court;

"Sec. 4. The several district courts of the United States are hereby invested with jurisdiction to prevent and restrain violations of this act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney-General, to institute proceedings in equity to prevent and restrain such violations. Such proceedings may be by way of petition setting forth the case and praying that such violation shall be enjoined or otherwise prohibited. When the parties complained of shall have been duly notified of such petition the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such petition and before final decree, the court may at any time make such temporary restraining order or prohibition as shall be deemed just in the premises;

"Sec. 7. Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act, may sue therefor in any district court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

The Act has generally been considered to be a mere codification of the common law abhorrence of bargains in restraint of trade. Necessity for the passage of the Act was found in the absence of such a thing as a federal common law, coupled with Congressional desire to strike down executed transactions (as distinguished from executory bargains) and combinations not precisely capable of common law cognizance.⁴

4. 5 Williston on Contracts (Rev Ed) section 1658. See, for cases involving arbitration clauses which were held to prove the monopolistic character of the contracts of which the arbitration clauses were a part, *Paramount Famous Lasky Corp. v.*

United States, 282 U.S. 30, 51 S. Ct. 42, 75 L. Ed. 145 (1930); *Paramount Famous Lasky Corp. v. National Theatre Corp.* 49 F(2d) 61 (CCA 4, 1931); *Universal Film Exch. v. West*, 163 Miss. 272, 142 S. 293 (1932).

Section 188. The Danbury Hatters Case.

The full force of the Sherman Act was brought to bear upon the activities of labor in the famous Danbury Hatters case.⁵ The facts in that case disclosed an attempt by the United Hatters of North America, a union affiliated with the American Federation of Labor, to secure a closed shop contract from the plaintiff, a manufacturer of hats in Danbury, Connecticut, who shipped the products of his manufacture into some twenty states of the Union. Of the eighty-two hat manufacturers in the country, seventy had theretofore entered into closed shop contracts with the union. Upon the plaintiff's refusal to accede to the union's demand, a strike was called, and the union, in cooperation with the American Federation of Labor, placed the plaintiff on an "unfair list" and boycotted not only the plaintiff but also those who purchased the plaintiff's hats for resale. The plaintiff's action was brought under Section 7 of the Sherman Act to recover threefold damages for these allegedly unlawful acts. The complaint

5. 208 US 274. 28 S Ct 301 52 L Ed 488, 13 Ann Cas 815 (1908). The case of *In re Debs*, 158 US 564, 15 S Ct 900, 39 L Ed 1093 (1895) was first to reach the United States Supreme Court, after the enactment of the Sherman law, and, indeed, the Circuit Court proceeded upon this law in granting the injunction in that case. But the United States Supreme Court, expressly stating that it intended to leave the question of the Sherman law's scope for the future, affirmed the holding of the Circuit Court "upon the broader ground that the Federal Government had full power over interstate commerce and over the transmission of the mails, and in the exercise of these powers could remove everything put upon highways, natural or artificial, to obstruct the passage and interstate commerce, or the carrying of the mails." Several lower federal court cases were decided in the

interim between passage of the Sherman Act and the holding of the court in the Danbury Hatters case, all holding the Sherman Act applicable to labor. (See Witte, *The Government In Labor Disputes* [1932], p. 62n) But they attracted little attention. Moreover, they involved, with but one exception, railroads, which were conceded to be in interstate commerce under the narrowest interpretation contended for. In addition, violence and intimidation connected directly with interstate commerce were present, and none of the cases involved civil actions for treble damages. In *Wabash R. R. Co. v. Hanahan*, 121 F 563 (CC ED Mo 1903) the Sherman Act was held inapplicable to an agreement among unionists not to work except under certain conditions, "even if the cost of interstate traffic would be thereby enhanced."

joined 197 defendants, most of whom were sought to be held liable, not because of their active participation in the alleged unlawful acts, but solely because they were members of the union. The defendants interposed a demurrer to the complaint, contending for the inapplicability of the Sherman Act. It was in connection with the overruling of this demurrer that the Supreme Court, in a unanimous decision, wrote the Danbury Hatters case. A trial was thereupon had, which resulted in a verdict for the plaintiff for the full amount which, when trebled, reached the figure of \$240,000. The defendants again appealed to the United States Supreme Court, which handed down a unanimous affirmance.⁶ Mr. Justice Holmes delivered the opinion of the court. A technical reading of the Danbury Hatters case indicates that the court held simply that a secondary boycott and possibly the publication of "unfair lists" were not permissible labor activities and hence were illegal combinations within the purview of the Sherman Act.⁷ But those associated with the labor movement, reading the language of the court and ascribing to that language an ordinary meaning, were fearful that all labor activities, if in restraint of interstate commerce, were thereby declared illegal.

Section 189. Was Labor Intended to Be Included within the Prohibitions of the Act?

Labor has complained that the Sherman Act was never intended to apply to labor unions but that, on the contrary, investigation into the Congressional background of the Act discloses that the Act was aimed only at combinations of capital. But the Supreme Court thought otherwise, holding in the Danbury Hatters case,⁸ as we have seen,

6. *Lawler v. Loewe*, 235 U.S. 522, 35 S. Ct. 170, 59 L. Ed. 341 (1915); *Loewe v. Lawler*, 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815 (1908).

7. That the Danbury Hatters case held "unfair lists" illegal is the interpretation placed upon the case in

Oakes, Organized Labor and Industrial Conflicts (1927), at p. 638.

8. *Loewe v. Lawler*, 208 U.S. 274, 28 S. Ct. 301, 52 L. Ed. 488, 13 Ann. Cas. 815 (1908). See also Landis, *Cases on Labor Law* (1934) (Historical Introduction) p. 37: "Some contemporaneous evidence indicates that

that the Act applied to combinations of labor as well as capital. An exhaustive book on the subject reaches the opposite conclusion.⁹ In support of the holding in the Danbury Hatters case, it is pointed out that an amendment to the Act proposed by Senator Sherman, whose effect would be to exempt labor unions from the Act, was rejected in the final law. The amendment read that the Act was not to apply to "any arrangements, agreements or combinations by laborers, made with a view of lessening the hours of their labor or of increasing their wages."¹⁰ But this point would have no important bearing upon the subject, since cases under the Sherman Act involving labor unions have conceded the legality of labor unions,¹¹ illegality being predicated, rather, upon the acts done by them. Hence inclusion of the amendment in question would not have changed the decision of a single case. Another argument offered by labor in support of its contention is that alteration of the proposed law prior to its enactment was of such a character that inclusion of the amendment was deemed superfluous. And it is true that the Congressional Record reveals an almost general agreement among both senators and congressmen to the effect that labor unions were beyond the intendment of the Act.¹²

Labor's viewpoint has recently been forcefully stated by Mr. Louis Boudin in a series of two articles in the Col-

labor combinations were not included in their ("anti-trust and anti-combination statutes of the United States, especially the Sherman Act of 1890") terms, but doubt must attend such a conjecture for the possibilities implicit in the broad legislative generalizations were more patent than latent."

9. Berman, *Labor and The Sherman Act* (1930).

10. See "The Federal Anti-Trust Law with Amendments," published by the United States Department of Justice, November 30, 1928. See also Witte, *The Government in Labor Dis-*

putes (1932), pp. 61-63.

11. With the one exception of *Hitchman Coal and Coke Company v. Mitchell*, 202 F 512 (DC ND W Va 1912) which was, however, reversed on appeal in 214 F 685 (CC ND W Va 1914). In another case, *Waterhouse v. Comer*, 55 F 149, 19 LRA 403 (CC WD Ga 1903), dicta inferring the illegality of labor unions under the Sherman Act must be understood in the light of the facts in the case. The case involved a public utility in the hands of a receiver.

12. Witte, *The Government in Labor Disputes* (1932), p. 62.

umbia Law Review.¹³ Mr. Boudin has marshalled the early English cases to prove his contention that neither labor combinations nor the activities of organized labor came within the purview of "combinations in restraint of trade" as those words were understood at common law. Moreover, he asserts, the Supreme Court in a number of cases has held that the Sherman Act is merely a codification of the common law, or at most a modification of the common law to the extent of recognizing as permissible "reasonable" combinations probably unlawful under the common law blanket ban. Mr. Boudin agrees with Prof. Berman's conclusion (though differing with the reasons assigned by the latter therefor) that the framers of the act never intended it to apply to labor combinations, and goes further than Prof. Berman to assert that the Sherman Act was not intended to apply as well to the activities of organized labor. Mr. Boudin concludes that "it follows as a necessary result of our entire inquiry that both upon an independent examination into the meaning of the language of the Sherman Act as interpreted by the application of familiar canons of statutory interpretation finally placed upon it by the United States Supreme Court in its most carefully reasoned opinions prior to the adoption of the Clayton Act, the ordinary labor dispute is not within the purview of the Sherman Act." It is indicated in the article that both strikes and boycotts are intended to be included in the words "ordinary labor dispute."

Mr. Bondin's article was written at a time when labor hoped to have the United States Supreme Court reverse its prior decisions in the light of later labor law developments, so as to hold the Sherman Act inapplicable to labor combinations and labor activities. At the time the article was published, there was pending before the United States Supreme Court for its decision the case of *Apex Hosiery Co. v. Leader*,¹⁴ which involved a Pennsylvania

13. Boudin, *The Sherman Act and Anti-Trust Laws* (1940), 34 Ill L Labor Disputes, 39 Col L Rev 1283 Rev 769.
(1939); 40 Col L Rev 14 (1940). 14. 310 US 469, 60 S Ct 982, 84 L See also Schulman, *Labor and the* Ed 1311 (1940).

sit-down strike in connection with a business which shipped most of its products into interstate commerce. The District Court had held the sit-down strike unlawful, and trebled the damages sustained by the complainant upon the ground that the unlawful labor activity constituted a restraint upon interstate commerce and hence came within the ban of the Sherman Act. The Court of Appeals for the Third Circuit had reversed¹⁵ upon the ground that the goods shipped by the complainant into interstate commerce were but a small fraction (about 3%) of the total goods of that kind shipped into interstate commerce by the entire industry throughout the United States, and upon the further ground that there was a lack of evidence of intent by the union to restrain interstate commerce. Certiorari was granted by the United States Supreme Court. The holding of the United States Supreme Court in the Apex case,¹⁶ which was handed down on May 27th, 1940, confounded labor's hopes and held it to be settled that labor combinations and labor activities, if unlawful, came within the ban of the Sherman Act. Said the court: "A point strongly urged in behalf of respondents in brief and argument before us is that Congress intended to exclude labor organizations and their activities wholly from the operation of the Sherman Act. To this the short answer must be made that for the thirty-two years which have elapsed since the decision of *Loewe v. Lawlor*, 208 US 274, this Court, in its efforts to determine the true meaning and application of the Sherman Act has repeatedly held that the words of the act, 'Every contract, combination . . . or conspiracy in restraint of trade or commerce' do embrace to some extent and in some circumstances labor unions and their activities; and that during that period Congress, although often asked to do so, has passed no act purporting to exclude labor unions wholly from the operation of the Act. On the contrary Congress has repeatedly enacted laws restricting or purporting to curtail the application of the Act to labor organizations and their

15. 108 F(2d) 71 (CCA 3, 1940).

16. 310 US 469, 60 S Ct 982, 84 L Ed 1311 (1940).

activities, thus recognizing that to some extent not defined they remain subject to it."

Section 190. Complaints of Unequal Interpretation.

Again, friends of labor have argued that court decisions interpreting the Act failed to accord to labor combinations the benefit of the same legal doctrines which were utilized to question the validity of combinations of capital. Although the Act seemed to condemn *all* contracts and combinations in restraint of trade and the United States Supreme Court so construed the Act in an early case,¹⁷ the court soon thereafter discarded this construction, and adopted instead a "rule of reason" whereby only "unreasonable" restraints of trade met with censure.¹⁸ This raised the problem as to which combinations are reasonable and which are unreasonable. No complaint can be had with the judicial amendment which the Courts appended to the Sherman Act, for otherwise ordinary partnerships and unincorporated joint-stock associations might be held to constitute unlawful restraints, as would also contracts containing necessary and reasonable restrictive covenants upon the sale of a business. Labor found fault, rather with the consequences which followed from the announced amendment. "As applied to combinations of capital, this concept is reducible to fairly workable terms, since it is relatively simple to ascertain prevailing and generally approved business practices. But in labor cases there is no such criterion and the personal attitude of members of the court is given free rein."¹⁹ The cases would seem to support the quotation. In *United States v. United States Steel Corporation*,²⁰ the United States Supreme

17. *United States v. Trans-Missouri Freight Ass'n*, 166 US 290, 17 S Ct 540, 41 L Ed 1007 (1897).

18. *Standard Oil Co. v. United States*, 221 US 1, 31 S Ct 502, 55 L Ed 619 (1910); *United States v. American Tobacco Co.* 221 US 106, 31 S Ct 632, 55 L Ed 663 (1910); *United States v. United Shoe Machin-*

ery, 247 US 32, 38 S Ct 473, 62 L Ed 968 (1917).

19. Note, 43 Harv L Rev 462 (1930). See also Frey, *The Double Standard in Applying the Sherman Act*, 18 Am Lab Leg Rev 302 (1923).

20. 251 US 417, 40 S Ct 293, 64 L Ed 343 (1917).

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Court held the Act to permit industrialists to combine in a single corporation 50% of the steel industry of the United States dominating the trade through its vast resources. And in *United States v. United Shoe Machinery Company*,²¹ the Sherman law was held to permit capitalists to combine in another corporation practically the whole shoe machinery industry of the country, necessarily giving it a position of dominance over shoe manufacturing in America. No such broad considerations were accorded labor activity. On the contrary, judicial decision under the Sherman law constituted virtually a blanket prohibition of any effective labor activities in industry directly related to interstate commerce, or related to labor's intent to interfere therewith.²²

The Sherman Act was qualified in two other respects on behalf of business enterprise, labor has contended, without similar qualifications in the interests of labor. First, contracts relating to personal services were held to be outside the purview of the Act.²³ The assertion by labor that it too was acting in concert with respect to personal services

²¹ 247 US 32, 38 S Ct 973, 62 L Ed 968 (1917).

²² See Frankfurter and Green, *The Labor Injunction* (1929).

²³ *Hopkins v. United States*, 171 US 578, 43 S Ct 290, 43 L Ed 290 (1898); *Anderson v. United States*, 171 US 604, 43 S Ct 300, 43 L Ed 300 (1898), *Hart v. Keith Vaudeville Exchange*, 12 F(2d) 741 (CCA 2, 1926), and see *Federal Baseball Club v. National League*, 259 US 200, 42 S Ct 465, 66 L Ed 898 (1922), where a bargain to control the baseball playing business was held to be without the Act, and *Sperry Hutchinson Co. v. Fenster*, 219 F 755 (DC ED NY 1915), where a bargain aimed at controlling the selling of trading stamps was likewise held to be without the purview of the Act. See also, in accord, the following state court decisions holding

personal service contracts to be without the purview of state anti-trust laws substantially similar to the Sherman Act. *Hareless v. Tyler*, 281 Mo 383, 219 SW 908 (1920), *State v. Duluth Bd of Trade*, 107 Minn 506, 121 NW 395 (1909), *State v. Frank*, 114 Ark 47, 169 SW 333 (1914) and the following cases holding such contracts permissible at common law. *Post v. Buck's Stove & Range Co.*, 200 F 918, 43 LRA(NS) 198, 119 CCA 214 (CCA 8, 1912), *Hunt v. Riverside Corporation Club*, 140 Mich 538, 104 NW 10 (1905), *American League Baseball Club v. Chase*, 86 Misc 441, 149 NYS 6 (1914). c/f *More v. Bennett*, 140 Ill 69, 29 NE 888 (1892), holding in restraint of trade a trade contract among stenographers regulating prices to be charged for their services.

("Labor is not a commodity") fell on deaf ears.²⁴

The validity of labor's claim of unequal interpretation has in this respect, however, been impaired by the case of *United States v. American Medical Association*,²⁵ which was an indictment under the Sherman Act of individual doctors, the American Medical Association, and affiliated societies, for alleged conspiracy in restraint of trade. The defendants, charged with hindering and obstructing a group health association by obstructing its physicians from privileges of consulting with other doctors and using the facilities of hospitals, interposed a demurrer, insisting, among other things, that they were not engaged in commercial activity and hence did not deal in a "trade," so that they could not be charged with conspiring "in restraint of trade." The district court sustained the demurrer.²⁶ The Circuit Court of Appeals reversed, and held

24 *C/f Rohlf v. Kasemeier*, 140 Ia 182, 118 NW 276, 23 I.R.A.(NS) 1284 132 Am St Rep 61, 17 Ann Cas 750 (1908), where the court, construing an anti-trust statute of that state, said "The statute in question was aimed at unlawful conspiracies or combinations in restraint of trade, and was manifestly intended not to cover labor unions. It is the right of miners, artisans, laborers or professional men to unite for their own improvement or advancement or for any other lawful purpose, and it has never been held so far as we are able to discover that a union for the purpose of advancing wages, is unlawful under any statutes which have been called to our attention.

And it would be a strained and unnatural conclusion to hold that a statute aimed at pools and trusts should be held to include agreements as to prices for labor because the word 'commodity' is used therein. As the right to combine for the purpose of securing higher wages is recognized as lawful at common law, a statute enacted to prohibit

pools and trusts should not be held to apply to combinations to fix the wages for labor unless it clearly appears that such was the legislative intent." See also *Apex Hosiery Co. v. Leader*, 310 US 469 60 S Ct 982, 84 L Ed 1311 (1940) where the court recognized the fact that combinations among employees in connection with contracts for personal services did not come within the common law rule against restraint of trade. "A combination of employees necessarily restrains competition among themselves in the sale of their services to the employer, yet such a combination was not considered an illegal restraint of trade at common law when the Sherman Act was adopted either because it was not thought to be unreasonable or because it was not deemed a 'restraint of trade'."

25. 28 F Supp 752 (DCD Col 1939), reversed 110 F(2d) 703 (CA DC 1940), cert den 310 US 644, 60 S Ct 131, 84 L Ed 1411 (1940).

26. 28 F Supp 762 (DCD Col 1939).

the indictment good.²⁷ Certiorari was denied by the United States Supreme Court.²⁸ "The common law governing restraints of trade," said the Circuit Court of Appeals, "has not been confined, as defendants insist, to the field of commercial activity ordinarily defined as 'trade,' but embraces as well the field of the medical profession. And since, as we think, we are required by the decisions of the Supreme Court to look to the common law as the chart by which to determine the class and scope of offenses denounced in Sec. 3, it follows that we must hold that a restraint imposed upon the lawful practice of medicine,—and a fortiori—upon the operation of hospitals and of a lawful organization for the financing of medical services to its members, is just as much in restraint of trade as if it were directed against any other occupation or employment or business. . . . Congress did not provide that one class any more than another, might impose restraints or that one class, any more than another, might be subjected to restraint."

Second, economic circumstances "realistically appraised" were held to justify practices by capital ordinarily deemed monopolistic. Illustrative is the case of *Appalachian Coals v. United States*,²⁹ where the Court said: "The question of the application of the statute is one of intent and effect, and is not to be determined by arbitrary assumptions. It is therefore necessary in this instance to consider the economic conditions peculiar to the coal industry, the practices which have obtained, the nature of defendant's plan of making sales, the reasons which led to its adoption, and the probable consequences of the carrying out of that plan in relation to market prices and other matters affecting the public interest in interstate commerce in bituminous coal." No such weighing of social interests, labor contended, were reflected in the decisions which passed upon labor activities.³⁰

27. 110 F(2d) 703 (CA DC 1940).

29. 298 US 344, 53 S Ct 471, 77

28. 310 US 644, 60 S Ct 131, 84 L

L Ed 825 (1933).

Ed 1411 (1940).

30. In one case, it was labor which

Section 191. Trade Boycotts Illegal under the Act.

✓Labor's description of the Sherman Act as a statute aimed initially at trade boycotts which has been used to condemn labor boycotts instead is not quite accurate in the broad manner in which the statement is usually made. While, as heretofore seen, labor boycotts were subject to mechanical analysis and consequent illegality, the federal courts in numerous instances held similar trade boycotts, and in several instances less drastic trade boycotts, illegal as violative of the Sherman Act. In the leading case of *Eastern States Retail Lumber Dealers' Association v. United States*,³¹ the United States Supreme Court held the circulation by an association of retail lumber dealers among their members of a so-called "official report" containing the names of dealers engaged in the trade who were reported to have sold directly to consumers in violation of a rule of the association, to be a violation of the Sherman Act, where it appeared that the report was circulated for the purpose of causing retailers to withhold their business from the wholesalers who appeared on the list. In *Grenada Lumber Company v. Mississippi*,³² where the constitutionality of a state anti-trust law was questioned insofar as it was construed by the state court to condemn a practice similar to that presented in the *Eastern States Retail Lumber Dealers' Association* case, *supra*, the Supreme Court of the United States upheld the statute. In a number of lower federal court cases, trade boycotts

invoked as party plaintiff the Sherman and Clayton Acts. In *Anderson v. Shipowners Association of the Pacific Coast*, 272 US 359, 47 S Ct 125, 71 L Ed 298 (1926), it was held that a suit was maintainable under the Sherman and Clayton Acts by a seaman, to enjoin as a combination in restraint of trade, maintenance of an agreement between an association of shipowners and a labor union, under the terms of which the shipowners undertook to employ none but seamen who were members of

the union and who had been certified to the shipowners as employable by the union. Thereupon a new trial was had, pursuant to direction of the court, but judgment was entered for the defendant because of insufficiency of plaintiffs' evidence. 31 F(2d) 539 (CCA 9, 1929), cert. den. 279 US 864, 49 S Ct 480, 73 L Ed 1002 (1929).

31. 234 US 600, 34 S Ct 951, 58 L Ed 1490 (1914).

32. 217 US 433, 30 S Ct 535, 54 L Ed 826 (1910).

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were held to come within the ban of the Sherman Act,³³ while in others they were held unlawful under the Federal Trade Commission Act.³⁴ In *United States v. Local 167*,³⁵ a trade association which had conspired with a labor union to enhance prices and to extort money from retailers was enjoined under the Sherman Act, together with the union, from continuing such practices.³⁶

Section 192. Present Application of the Act Deferred for Consideration in Subsequent Sections.

Speaking generally, the Sherman Act applies to labor today with almost the same force and effect as that which resulted from the holding of the United States Supreme Court in the *Danbury* case.³⁷ In some respects the Act applies with broader if not greater effect, as where jurisdiction under the Act is taken of peaceful primary labor activity upon the ground that the given purpose sought to be achieved is deemed socially undesirable. On the other hand, however, a rule of reason seems to have developed in labor disputes cases analogous to that governing combinations of capital which has modified the original implications of the holdings in the labor cases under the Sherman Act.

The extent to which the Sherman Act is still the law governing labor disputes will be examined in a later chapter of this work,³⁸ after analysis will have been made of

33. *Boyle v. United States*, 40 F (2d) 49 (CCA 7, 1930); *United States v. Southern California Wholesale Grocers Ass'n*, 7 F(2d) 944 (DC SD Cal 1925); *United States v. Hollis*, 246 F 611 (DCD Minn 1917); *Knauer v. United States*, 237 F 8 (CCA 8, 1916).

34. *Arkansas Wholesale Grocers Ass'n v. Federal Trade Commission*, 277 F 657 (CCA 5, 1922), cert. den 275 US 533, 48 S Ct 30, 72 L Ed 411 (1927); *Wholesale Grocers Ass'n v. Federal Trade Commission*, 277 F 657 (CCA 5, 1922); *Western Sugar*

Refinery Co v. Federal Trade Commission, 295 F 725 (CCA 9, 1921).

35. 291 US 293, 54 S Ct 396, 78 L Ed 804 (1934).

36. The parties were successfully prosecuted criminally under the Sherman Act. See 47 F(2d) 156 (CCA 2, 1931), cert den 283 US 837, 51 S Ct 486, 75 L Ed 1448 (1931).

37. See *Apex Hosiery Co. v. Leader*, 310 US 409, 60 S Ct 982, 84 L Ed 1311 (1940).

38. See *infra*, chapter nineteen, and especially sections 420-422.

the Clayton, Norris and National Labor Relations Acts. Discussion will thus be given to the larger picture of the nature and extent of the present federal law governing labor relations.

CHAPTER THIRTEEN

THE CLAYTON ACT

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Section 193. Purposes and Provisions of the Act.

✓ The Clayton Act (1914)¹ was passed with a twofold purpose, the first of which was to exempt labor combinations from the vice of the Sherman Act upon the theory, expressly stated in the Clayton Act, that "The labor of a human being is not a commodity or an article of commerce," and the second of which was to limit both the employment and the manner of employment in federal courts, of the labor injunction. Section 6² of the Act sought to accomplish the first purpose, while Section 20³ as supplemented by other sections, was expected to achieve the second purpose. Of the 27 sections contained in the Act, only 12 affect labor.

✓ Section 6 of the Act provides that "The labor of a human being is not a commodity or article of commerce. Nothing contained in the anti-trust laws shall be construed to forbid the existence and operation of labor, agricultural or horticultural organizations, instituted for the purpose of mutual help, and not having capital stock or conducted for profit, nor to forbid or restrain individual members of such organizations from lawfully carrying out the legiti-

¹ "Act of October 15th 1914 c 390, 29 USCA sec 52
323, sec 1, 38 Stat 730, 15 USCA ² 15 USCA section 17.
sections 12-27, 44, 18 USCA sec ³ 20 USCA section 62.
412, 28 USCA sections 381 383, 386-
570

mate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws."

Section 20 of the Act provides that "No restraining order or injunction shall be granted by any court of the United States, or a judge or the judges thereof, in any case between an employer and employees, or between employers and employees, or between employees, or between persons employed and persons seeking employment, involving, or growing out of a dispute concerning terms or conditions of employment, unless necessary to prevent irreparable injury to property or to a property right, of the party making the application, for which injury there is no adequate remedy at law, and such property or property right must be described with particularity in the application, which must be in writing and sworn to by the applicant or by his agent or attorney:

"And no such restraining order or injunction shall prohibit any person or persons, whether singly or in concert, from terminating any relation of employment, or from ceasing to perform any work or labor, or from recommending, advising, or persuading others by peaceful means so to do; or from attending at any place where any such person or persons may lawfully be, for the purpose of peacefully obtaining or communicating information, or from peacefully persuading any person to work or to abstain from working; or from ceasing to patronize or to employ any party to such dispute, or from recommending, advising, or persuading others by peaceful and lawful means so to do; or from paying or giving to or withholding from, any person engaged in such dispute, any strike benefit or other moneys or things of value; or from peaceably assembling in a lawful manner and for lawful purposes; or from doing any act or thing which might lawfully be done in the absence of such dispute by any party thereto; nor shall any of the acts specified in this paragraph be considered or held to be violations of any law of the United States."

Section 17⁴ of the Act provides that "No preliminary injunction shall be issued without notice to the opposite party" and that "no temporary restraining order shall be granted without notice to the opposite party unless it shall clearly appear from specific facts shown by affidavit or by the verified bill that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereof." If granted without notice, the restraining order expires "within such time after entry, not to exceed ten days, as the court or judge may fix, unless within the time so fixed the order is extended for a like period for good cause shown," and that, in any event, "the matter of the issuance of a preliminary injunction shall be set down for a hearing at the earliest possible time and shall take precedence of all matters except older matters of the same character, and when the *same comes up for hearing the party obtaining the temporary restraining order shall proceed with the application for a preliminary injunction, and if he does not do so the court shall dissolve the temporary restraining order*" The opposite party is given authority upon two days' notice to seek modification or dissolution of the temporary restraining order

Section 18⁵ of the Act provides that no temporary restraining order or preliminary injunction shall issue without bond to secure the party against whom the mandate is obtained against damages sustained, should the mandate be found to have been wrongfully obtained,⁶ while Section

4 28 USCA section 381

5 28 USCA section 382

6 It is well settled that, in the absence of the statute, a restraining order may be granted, in the discretion of the court, with or without security. *Hutchins v Munn* 209 U S 46, 28 S Ct 304, 52 L Ed 776 (1908). Under this section, the furnishing of security as a condition to the obtaining of a temporary restraining order is imperative. *Robinson v Benbow*, 572

298 F 561 (CCA 4, 1924), except in two classes of cases: (1) in cases where the United States government is the complainant, *United States v McIntosh*, 57 F (2d) 573 (DC Va 1932); (2) in cases involving proceedings to prevent impairment of the court's jurisdiction, as where property is in the hands of the federal court by virtue of the Bankruptcy Act. *Dealtry v Posse School*, 100 F(2d) 470 (CCA Mass 1938). See

19⁷ provides that "every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same." Section 21⁸ of the Act provides for trial by jury of persons accused of indirect contempt, but only where the alleged contempt constitutes also a crime. Section 22⁹ outlines the procedure for the apprehension of persons accused of contempt, the manner of their admission to bail, the method of trial, and the punishment, "but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of \$1,000, nor shall such imprisonment exceed the term of six months." Section 23¹⁰ provides for review of the conviction upon appeal, Section 24¹¹ excludes from the operation of former sections contempts committed in the presence of the court, "or so near thereto as to obstruct the administration of justice," and Section 25¹² provides that "No proceeding for contempt shall be instituted against any person unless begun within one year from the date of the act complained of; nor shall any such proceeding be a bar to any criminal prosecution for the same act or acts." In Section 4¹³ the Clayton Act provides, in substantiation of a like provision contained in the Sherman Act, for threefold damages obtainable by any person injured in his business or property through violation of the anti-trust laws.

It was section 16¹⁴ of the Clayton Act which accorded to

also Harvey Brokerage Co. Inc. v	10	28	USCA	section 388
Ambassador Hotel Corporation, 6 F	11	18	USCA	section 389
Supp 345 (DC SD NY 1934).	12	18	USCA	section 390
7	28	USCA	section 383	
8	28	USCA	section 386	13, 15
9.	28	USCA	section 387.	15
	14	15	USCA	section 26

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private parties injured through violation of the anti-trust laws the right to injunctive relief. A private party could not theretofore maintain a suit for injunction to restrain a violation of the Sherman Act.¹⁵

Section 194. Labor's Expectations with Respect to the Act.

The Clayton Act was hailed by labor leaders everywhere at the time of its enactment. Samuel Gompers explained the Act to a grateful labor world with the language: "Those words, 'the labor of a human being is not a commodity or article of commerce,' are sledge hammer blows to the wrongs and injustices so long inflicted upon the workers. This declaration is the *Industrial Magna Charta* upon which the working people will rear their construction of industrial freedom." Nor was Gompers misled by the generating propensities of his own viewpoint, for the opinion was generally entertained that the Clayton Act was a forward step in the legalization of trade unions and their activities, including the strike, picket and boycott. In *Walter v. Toohey*,¹⁶ the court asserted the legality of picketing by pointing to the Clayton Act in the following manner: "Thus we find the right to picket definitely sanctioned and rooted in the statute laws of the federal government . . . it also sweeps away all that has been previously written by the federal courts in opposition to picketing. And not only that, but it sets forth in bold, certain statutory language, the trend of modern thought against injunctions in labor disputes."

The Clayton Act was the American counterpart of the English Trades Dispute Act of 1906,¹⁷ and, because the

15. *Paine Lumber Co. v. Neal*, 244 US 459, 37 S Ct 718, 61 L Ed 1256 (1917). In this case, an injunction restraining the boycotting of non union materials was refused upon the ground that the action, having arisen prior to passage of the Clayton Act, could not invoke the subsequently enacted Clayton Act and

was bound by the provisions of the Sherman Act.

16. 114 Misc 185, 221 NYS 95 (1921).

17. See *Great Northern R Co v. Brosseau*, 286 F 414 (DCD ND 1923). "Our statute forbids expressly the issuing of injunctions against the doing of the acts, and also declares

English law was generally considered to be a progressive step in pro-labor legislation, it was thought that the Clayton Act would likewise receive favorable judicial interpretation in labor's behalf. But the differences occasioned by the American constitutional law and the labor cases which had interpreted the anti-trust laws disposed of the Clayton Act to the detriment and not to the benefit of labor. The Act was so emasculated by successive federal judicial decisions that only one of its provisions, that giving to private persons (employers) the right to injunctive relief, remained to refresh and to annoy the recollection of labor with respect to its existence. The story of that emasculation is mainly a record of the triumph of the theory of natural rights over the plain mandates contained in social legislation¹⁸

Section 195. United States Supreme Court Holdings Which Confounded Labor's Expectations.

In *Duplex Printing Press Co. v. Deering*,¹⁹ where the United States Supreme Court first had occasion to pass upon the meaning of the Clayton Act and later in *Bedford Cut Stone Co. v. Journeymen Stone Cutters Association*²⁰ the secondary strike and the secondary boycott were held to be illegal and hence enjoined in spite of the Act. The use of the terms "lawful" and "lawfully" or "peaceful" and "peacefully" in connection with the acts permitted to be done by the Clayton law, said the court in the *Deering*

that the doing of the same shall not be construed or held to be a violation of Federal law. The English act, without expressly dealing with the subject by forbidding injunctions, does so impliedly by conferring upon employees in the case of a trade dispute the right to do the acts. The only difference in the statutes is that our law is express on the subject of forbidding injunctions in the cases specified, while the English statute accomplishes the same result by implication."

18. Partly the story is the reflec-

tion of poor legislative draftsmanship. See section 420, *infra* c/f *Great Northern R. Co. v. Brosseau*, 286 F. 414 (DCD ND 1923) where the court said "There is no reason that a just court can assign why American courts should not have as cheerfully obeyed the Clayton Act as the English courts obeyed the Trade Disputes Act of 1906"

19. 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 319, 16 ALR 196 (1921).

20. 274 U.S. 37, 47 S. Ct. 522, 71 L. Ed. 916 (1927).

case, operated to "rebut a legislative intent to confer a general immunity for conduct violative of the Anti-Trust laws, or otherwise unlawful." And in *American Steel Foundries v. Tri-City Central Trades Council*,²¹ decided the same year but shortly after the *Duplex* case, the court confounded the remarks of the *Walter* case²² with the observation that the Act refrained from using the "sinister" word "picketing" and consequently branded that form of activity with the stamp of illegality.²³

The *American Steel Foundries* case did more. It held the Clayton Act merely declaratory of the common law as theretofore laid down by judicial decisions. This the High Court did to sustain the constitutionality of the Act, for, said the Court, were the Act construed so as to permit labor activity theretofore held illegal, it would be stamped as unconstitutional since attempting to legalize interference with a rightful business. Within a few weeks after the *American Steel Foundries* case, in *Truax v. Corrigan*,²⁴ the court indicated what it meant in so reasoning. It seemed that an Arizona anti-injunction statute which followed the provisions of the Clayton Act was construed by the state Supreme Court to exempt from injunctive restraint mass picketing where unconnected with any violence.²⁵ Upon appeal to the United States Supreme Court, the court in the *Truax* case held the Arizona statute unconstitutional because the employer's substantive property right (the right to carry on a lawful business) was thereby denied the most effective remedy (the remedy of injunc-

21. 257 US 184, 42 S Ct 72, 86 L Ed 189, 27 ALR 360 (1921)

22. See section 194, *supra*

23 *Present Status of the American Steel Foundries Case*. In *Thornhill v Alabama*, 310 US 88, 60 S Ct 736, 84 L Ed 1093 (1940), where an Alabama anti picketing statute was held unconstitutional because so broadly worded as to constitute a deprivation of the right to free speech, the court cited the *American Steel Foundries* case

in connection with the following language: "We are not now concerned with picketing en masse or otherwise conducted which might occasion such imminent and aggravated danger to these interests as to justify a statute narrowly drawn to cover the precise situation giving rise to the danger"

24 257 US 312, 42 S Ct 124, 66 L Ed 254, 27 ALR 375 (1921)

25 *Truax v Corrigan*, 20 Ariz 7, 176 P 570 (1918).

tion) for the vindication of that right. The year 1927 was thus a most dismal one in the history of the American labor movement. Decades of effort to obtain legislative relief from common law holdings met with judicial holdings that the statute passed as a consequence of that effort was merely declaratory of the common law as theretofore constituted and that any attempt to place a different construction upon statutes of like effect would be unconstitutional.

Section 196. Lower Federal Court Interpretations.

Both before the Duplex case, after the Bedford case and in the interim, lower federal courts busied themselves with holdings which nullified the Clayton Act. The Act, it was held, was merely declaratory of the prior law²⁶. Hence picketing was no more legal after the Act than before²⁷. Likewise held illegal were picketing in the absence of a strike,²⁸ a strike to unionize,²⁹ a strike for a wrongful purpose,³⁰ and

²⁶ *Stephens v Ohio State Telephone Company*, 240 F 759 (DC ND Ohio 1917), *Kroger Grocery Co v Retail Clerks Asso* 250 F 890 (DC ED Mo 1918)

²⁷ *Montgomery v Pacific Ry Co* 258 F 382, 169 CCA 308 (CCA 9, 1919), *Vonnegut Machinery Co v Toledo Machine & Tool Co* 263 F 192 (DC ND Ohio 1920), *Langenberg Hat Co v United Cloth Hat and Cap Makers*, 266 F 127 (DC ED Mo 1920) *Contra Puget Sound Traction, Light & Power Co v Whitely* 213 F 945 (DC WD Wash 1917) holding peaceful picketing, insulated from injunctive relief by the Clayton Act. See also *Kinloch Telephone Co v Local Union*, 265 F 312 (DC ED Mo 1920), holding likewise, and also that a strike though in violation of a collective bargaining agreement, is unenjoinable because of the Clayton Act, *Portland Terminal Co v Foss*, 287 F 33 (CCA 1, 1923), holding a strike unenjoinable under the Act though in breach of an agree-

ment entered into under the Transportation Act of 1920 *Gassaway v Borderland Coal Corporation*, 278 F 56 (CCA 7, 1921), and *King v Weiss*, 266 F 257 (CCA 6, 1920), reversing blanket injunctions because not limited to unlawful conduct *Davis v Henry*, 266 F 261 (CCA Ky 1920) holding a restraining order against strikers in general terms against interference in any way, and from picketing the highways or means of ingress or egress too broad because extending to acts which do not necessarily constitute unlawful influence

²⁸ *Ferguson v Peake*, 18 F(2d) 166 (CA DC 1927)

²⁹ *Columbus Heating & Ventilation Co v Pittsburgh Bldg Trades Council*, 17 F(2d) 806 (DC WD Pa 1927)

³⁰ *Michaelson v United States* 291 F 940 (CCA 7, 1923) reversed on other grounds in 266 US 42, 45 S Ct 18, 89 L Ed 162, 27 ALR 451 (1924).

a secondary strike.³¹ Attempts by union organizers to enlist the membership of workmen met with injunctive interference by courts who insisted that "outsiders," not being employees as defined by the Act, could claim no immunities thereunder.³² The existence of yellow-dog contracts in the field attempted to be unionized was an added obstacle, courts holding that, despite the social interest in union organization reflected in the provisions of the Clayton Act, the Act was no bar to decisions that union organizers were guilty of seeking to induce the breach of an anti-union contract, and to the issuance of an injunction restraining any attempted inducement to breach such a contract.³³ More clearly vitiating any benefit which labor expected by virtue of the Act is *Quinlivan v. Dail Overland Company*,³⁴ where a strike was held to terminate the relationship of employer-employee upon the employer's securing replacement workers, so as to make inapplicable the provisions of the Clayton Act against the issuance of injunctions.³⁵ The ability of the employer to operate his plant on a normal basis notwithstanding the strike was held to terminate the employment relationship so as to bring the picketing employees'

31 *Vonnegut Machinery v. Toledo Machine & Tool Co.* 263 F 192 (DC ND Ohio 1920); *Buyer v. Guilan*, 271 F 65, 16 ALR 216 (CCA 2, 1921), *Central Metal Products Corporation v. O'Brien*, 278 F 827 (DC ND Ohio 1922).

32 *Montgomery v. Pacific Ry. Co.* 293 F 650, 169 CCA 398 (CCA 9, 1923), *Waitresses Union v. Benish Restaurant Co. Inc.* 6 F(2d) 568 (CCA 8, 1925), *Ferguson v. Peake*, 18 F(2d) 166 (CA DC 1927), *International Organization v. Red Jacket*, 18 F(2d) 839 (CCA 4, 1927), cert. den. 275 US 536, 48 S Ct 31, 72 L Ed 413 (1928).

33 *International Organization v. Red Jacket*, 18 F(2d) 837 (CCA 4, 1927) cert. den. 275 US 536, 48 S Ct 31, 72 L Ed 413 (1928), *Charleston Dry Dock & Machine Co. v. O'Rourke* 578

274 F 811 (DC ED SC 1921), *Montgomery v. Pacific Ry. Co.* 293 F 650, 169 CCA 398 (CCA 9, 1923) c/f *Gasaway v. Borderland Coal Corporation*, 278 F 56 (CCA 7, 1921).

34. 274 F 56 (CCA 6, 1921)

35 C/f *Michaelson v. United States*, 266 US 42, 45 S Ct 18, 69 L Ed 162, 27 ALR 451 (1924) where the contention that a strike terminates the employment relationship so as to render inapplicable the jury trial provision in the Clayton Act for persons alleged to be guilty of contempt was held untenable. "The Act," said the court, "does not require the existence of the status of employment at the time the acts constituting the alleged contempt are committed in order to bring into operation the provision for trial by jury."

conduct without the purview of the Act. In one case, the mere act of striking was held to terminate the employment relationship.³⁶ Injunctions against labor unions issued where individuals had committed unlawful acts, without proof that the union had authorized the acts or had ratified them, upon the assumption that the union, having precipitated the controversy, must be held responsible for its incidents.³⁷ In *Taliaferro v. United States*,³⁸ a barber who had displayed a placard reading "no scabs wanted here" was held guilty of contempt for violation of a labor injunction, though there was no evidence that the barber was in league with the strikers, or, from aught that appeared, that he did anything but indicate his union sympathies. The *Taliaferro* case also held that, since the Clayton Act forbade the issuance of injunctions in restraint only of lawful activities, the Act was inapplicable where the acts done constituted criminal offenses. In *Western Union Telegraph Co. v. International Brotherhood*,³⁹ a labor combination in restraint of interstate commerce was held not entitled to the benefit of the Clayton Act.

36 *Canoe Creek Coal Co v Christenson*, 281 F 559 (DC WD Ky 1922) reversed on another ground sub nom *Sandefur v Canoe Creek Coal Co* 293 F 379 (CCA 6, 1923) 266 US 42, 45 S Ct 18, 69 L Ed 162, 35 ALR 451, (1924). See also *Vaughan v Kansas City M P O U* 36 F(2d) 78 (1929), *United States Gypsum Company v Heslop* 39 F(2d) 228 (1930).

37 *Alaska S S Co v International Longshoremen's Association* 236 F 964 (DC WD Wash 1916), *Charleston Drydock & Machine Co v O'Rourke*, 264 F 811 (DC ED SC 1921), *United States v. Railway Employees*, 283 F 479 (DC ND Ill 1922), 286 F 228 (DC ND Ill 1922); *Gr Northern Rwy Co v Local Union*, 283 F 657 (DCD Mont 1922); N. Y.,

N H and H R. R Co v A. F of L 288 F 588 (DCD Conn 1923).

38 290 F 214 (DC WD Va 1922) aff'd 290 F 906 (CCA 4, 1923).

39 2 F(2d) 993 (DC ND Ill 1924), aff'd 6 F(2d) 444 46 ALR 1538 (CCA 7, 1925). Accord *International Organization v Red Jacket*, 18 F(2d) 839 (CCA 4 1927) cert den 275 US 536, 48 S Ct 31, 72 L Ed 413 (1928). *Contra* *Great Northern Rwy Co v Local Union* 283 F 557 (DCD Mont 1922). In the *Western Union Telegraph Company* case the plaintiff was a public utility. See, for a case interpreting the meaning of interstate commerce in this connection, *Aeolian Co v Fisher*, 29 F(2d) 679 (CCA 2, 1928).

**Section 197. Great Northern Railway Co. v. Brosseau;
Great Northern Railway Co. v. Local Great Falls
Lodge.**

In two main cases, *Great Northern Ry. Co. v. Brosseau*,⁴⁰ and *Great Northern Ry. Co. v. Local Great Falls Lodge*,⁴¹ the Clayton Act was subjected to the kind of interpretation which labor insisted it had reason to suppose at the time of its enactment would be the rule and not exceptions. The Brosseau case arose out of an application to restrain acts of violence in connection with a railway strike. A temporary restraining order, and, after a hearing, a preliminary injunction was issued. The opinion of the court, per Amidon, J., was meant to be a comment upon the controversy involved, in the light of the Clayton Act and the manner in which courts had construed the Act. First condemned were the many federal court decisions which had the effect of emasculating the Act. "Notwithstanding the legislative history of the statute," said the court, "and its highly remedial character, as indicated by its history and the reports of committees having it in charge, many lower federal courts have studiously striven to disregard its plain language, as well as the actual intent of Congress as disclosed by the history of the statute." Then the court proceeded to criticize: the practice of issuing prolix injunctions which nobody, let alone those who were supposed to read and obey them, could understand, the issuance of such injunctions on bare affidavits without hearing in open court, the use of private detectives in connection with strikes, instead of disinterested public officers. Finally, the court adverted to the injustice of holding unions responsible for all acts of violence committed in the course of a labor controversy. "Why should wrongs and crimes," the court complained, "whether done by hotheads in the union or by vicious outsiders who claim to be their friends, be seized upon as an index of the character of the union or its officers? Why not deal with such wrongs and crimes as we do in other fields of life . . .?"

40. 286 F 414 (DCD ND 1923)

v. Whitley, 243 F 945 (DC WD Wash

41. 283 F 557 (DCD Mont 1922)

1917).

See also *Puget Sound Traction Co.*

The Local Great Falls Lodge case likewise arose out of a railway strike. The injunction sought by the plaintiff was one to restrain the strike as violative of an award made by the Railroad Labor Board and to restrain all picketing because of the alleged existence of violence and intimidation in its exercise. The union countered with the charge that the employer was itself guilty of refusing to abide by some of the Board's orders and that violence, if any, connected with the controversy was the reflection of the employer's provocation and not the employees' doings. The court held the strike unenjoinable as violative of the award made by the Railroad Labor Board upon the theory that, even assuming the strike to be such a violation, it did not follow that the strike was for that reason tainted with illegality in the light of the curtailed functions of the Board under the Transportation Act of 1920. Then the court proceeded to discuss the main question, viz. the effect of the Clayton Act upon the right to injunctive relief. When the decision of the court was concluded the holding was that the union had a right to picket. Said the court: "By the Clayton Act Congress recognizes the necessity and value of labor unions and labor activities in the matter of conditions of employment; that they have done and are yet capable of a great work; that to the workman and his, a job is life, wherein eternal vigilance is no less the price of a worthy job than of liberty, and that its loss too often changes the current of human lives and spells disaster. Hence the Clayton Act, to aid his last ditch struggle to retain his job against all comers. To that end the act provides the workmen may "recommend, advise and persuade" and by all lawful means fairly within the import of those terms. All art, eloquence, oratory, and logic are open to the workmen to accomplish persuasion."

The plaintiff contended that the stationing of more than one picket was instinct with a situation which contributed to the existence of violence and intimidation. But the court thought otherwise, saying, "it has appeared that pickets need the support of numbers if only for corroboration." Then the court took up the issue of violence and indicated

the two-sided aspect of the matter as follows: "Force and violence are strangers to neither party to strikes, and either may give a Herrin for a Ludlow. The parties forget that aggression incites retaliation, and violence breeds violence. Then, too, the pickets of one are generally confronted, if not overawed, by armed guards of the other, and by police, sheriffs, and marshals, who too often forget they are public officers, with duty to protect both parties, and mistakenly assume they are partisans of one party or the other."

Section 198. The First and Second Coronado Cases.

Returning now to the general tack of decisions which the Clayton Act sired, it is necessary to state the factual pattern and the legal consequences which culminated in what are popularly known as the first and second Coronado cases. The controversy, which extended from 1914 to 1927, was precipitated by the breach on the part of eight affiliated mining companies in Arkansas, of a collective bargaining agreement entered into with District Number 21 of the United Mine Workers of America. In spite of the mining companies' breach of agreement, and in spite of the Clayton Act, they were successful in obtaining an injunction in the federal court, using for the purpose of creating diversity of citizenship and thereby of obtaining federal jurisdiction a holding company formed in West Virginia. Included in the injunction was a provision which directed the United States Marshal to swear in deputies to assist him in protecting the mines. When the Marshal telegraphed to John W. Davis, then acting Attorney General, for authorization to employ fifty additional deputies, Mr. Davis refused the request upon the ground that the court's order in this respect exceeded its jurisdiction and hence was void and unlawful. The mining companies nevertheless reopened their mines, using as employees strike guards furnished by a detective agency with whom, it later turned out, the companies had contracted prior to the time they breached the collective bargaining agreement. The union members' anger was fanned by successful contempt proceedings instituted to punish the union leaders for violation of what the union

considered an unjust injunction.⁴² Armed union sympathizers attacked the mines. Several strike guards were killed in the ensuing violence. The mines, unable to weather such circumstances, were rendered insolvent. The receiver appointed for them instituted suit to recover treble damages under the Sherman Act. The United Mine Workers interposed a demurrer to the complaint, upon the ground, among others, that the union's wrongdoing, if any, did not constitute a restraint of interstate commerce so as to make applicable the provisions of the Sherman Act. The District Court sustained the demurrer and dismissed the complaint, but the Circuit Court of Appeals reversed and directed the defendant to answer.⁴³ Certiorari was denied by the United States Supreme Court.⁴⁴ Upon the trial the plaintiff was awarded a verdict of \$600,000. which was entered as a judgment in the sum of \$745,600. after interest, costs and attorneys' fees had been included. The Circuit Court of Appeals was asked to reverse the judgment, but refused.⁴⁵ A dissenting opinion in the Circuit Court stated: "After the jury had deliberated without result for about two days, the trial court of its own motion recalled and charged them in a way that soon produced the verdict." Upon appeal to the United States Supreme Court, the judgment was reversed,⁴⁶ upon the ground that, although the district union was assumedly suable⁴⁷ and liable, no connection had been established between the district union and the national organization such as to prove an intent to restrain interstate commerce. In the absence of such connection, said the court, the strike was local merely, and hence so unconnected with interstate commerce as to lay insufficient foundation for application of the Sherman Act. This

⁴² *United States v. Colorado*, 216 F. 654 (DC WD Ark 1914) *aff'd* *United States v. Stewart*, 236 F. 838 (C. A. 8, 1916)

⁴³ *Dowd v. United Mine Workers*, 235 F. 1 (CCA 8, 1916).

⁴⁴ 242 U.S. 653, 37 S. Ct. 246, 61 L. Ed. 547 (1917).

⁴⁵ *Coronado Coal Co. v. United*

Mine Workers, 258 F. 829 (CCA 8, 1919)

⁴⁶ *United Mine Workers v. Coronado Coal Co.* 259 U.S. 344, 42 S. Ct. 570, 66 L. Ed. 975, 27 ALR 762 (1922)

⁴⁷ For a discussion with respect to the suability of labor unions, see *infra*, chapter twenty five

was the holding in the so-called "first Coronado case." The case went back for a new trial, but the evidence of intent to interfere with interstate commerce which the plaintiff introduced appeared so weak to the trial judge that he directed a verdict for the defendants. The plaintiffs appealed. The Circuit Court of Appeals affirmed,⁴⁸ but the United States Supreme Court reversed,⁴⁹ holding (in what has become known as the "second Coronado case") that at the second trial sufficient evidence had been introduced to show intent to restrain interstate commerce, and to require submission of the issues involved to the jury. The third trial resulted in a disagreement, and a fourth trial proceeded to the point where a jury was impanelled, but a settlement was effected on October, 1927, under the terms of which district 21 paid the sum of \$27,500 to the plaintiffs.⁵⁰

48. *Finley v. United Mine Workers*, 300 F. 972 (CCA 8, 1924)

551, 69 L. Ed. 963 (1925)

49. *United Mine Workers v. Coronado Coal Co.* 268 U.S. 295, 45 S. Ct.

50. Witte, *The Government in Labor Disputes* (1932), p. 137

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Section 199. Object and General Purpose.

✓ The Norris-LaGuardia Anti-Injunction Act (1932)¹ must be understood in terms partly of the failure of the Clayton Act at the hands of an unfriendly judiciary, and partly of the gains made by labor in many of the states both through pro-labor statutes and judicial decisions more favorably disposed to labor's claims. In *New Negro Alliance v. Sanitary Grocery, Inc.*,² the United States Supreme Court said, speaking of the Norris Act, that "The legislative history of the Act demonstrates that it was the purpose of Congress further to extend the prohibitions of the Clayton Act respecting the exercise of jurisdiction by the federal courts and to obviate the results of the judicial construction of that act." The object of the act is to limit the equity powers of federal courts in cases involving labor controversies.

✓ The general purpose of the act is said to be the termination of the federal courts' power to issue injunctions in any cases involving a "labor dispute" except to protect property or property rights against the consequences of irreparable violence or fraud,³ and even then only in such cases where

1. Act of March 23rd, 1932, c. 90, 47 Stat. 70, 29 USC A. m. c. 101-115. The entire text of the Act is found in the Appendix.

2. 303 US 552, 562, 58 S Ct 703, 707, 82 L Ed 1012 (1938).

3. *Wilson & Co. v. Birl*, 27 F Supp 915 (DC ED Pa 1939); *aff'd* 105 F 586

(2d) 948 (CCA 3, 1939); *Cinderella Theatre Co. Inc. v. Sign Writers Local Union*, 6 F Supp 164 (DC ED Mich SD 1934); *Levering & Garrigues Co. v. Morrin*, 71 F(2d) 284 (CCA 2, 1934) cert. den 293 US 595, 55 S Ct 110, 79 L Ed 688 (1924).

the applicant can demonstrate to the court his own inability to effect a settlement of the controversy and the inability or unwillingness of the police to afford him adequate protection. In *Wilson & Co. v. Birl*,⁴ the background and the general purpose of the Norris Act were thus summarized: "When the Sherman Act was amended in 1914 by the Clayton Act, section 6 of the latter provided that labor unions should not 'be held or construed to be illegal combinations or conspiracies in restraint of trade, under the anti-trust laws;' and section 20 regulated the granting of injunctions in cases between employer and employees, and exempted certain acts from restraint. The language would appear to differentiate labor unions from trade combinations, and to exclude them from the operations of the Act. Yet the decisions have emptied the words of significance other than the affirmation of what the law has been for a long time—that labor unions are not in themselves unlawful. The act had little effect in narrowing equity jurisdiction in labor disputes. We believe that the Norris-LaGuardia Act was adopted to prevent a similar construction." "In short," to quote the language of the lower court in the same case,⁵ "it was an adoption of the philosophy of Justice Brandeis's dissenting opinion in *Duplex Printing Press Co. v. Deering*,⁶ which condemned the point of view which made conduct actionable 'when done for a purpose which a judge considered socially or economically harmful and therefore branded as malicious and unlawful.' " In *Bulkin v. Sacks*,⁷ the Pennsylvania court, speaking of the State Anti-Injunction Act patterned upon the Norris Act and the State Labor Relations Act fashioned after the Wagner Act, said: "A reading of these statutes indicates that the public policy is not merely to protect labor against the issuance of injunctions and to compel or protect collective bargaining, but also to relieve the courts from the necessity of passing upon or even considering these cases until all other methods of settling them

4. 105 F(2d) 948 (CCA 3, 1939)

6. 254 US 443, 41 S Ct 172, 65 L

5. *Wilson & Co. v. Birl*, 27 F Supp 915 (DC ED Pa 1939).

Ed 349, 16 ALR 196 (1921)

7. 31 Pa D & C 501 (1938)

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have failed. There is a very definite policy of keeping labor disputes out of the courts."

The Norris Act is not a blanket deprivation of federal jurisdiction over controversies which constitute "labor disputes," but simply a regulation of the manner of exercising that jurisdiction; hence federal courts may entertain jurisdiction as limited by the Act, notwithstanding that the law thereby resulting is less favorable to a picketed employer than would be the law of the state where the picketing takes place.⁸

Section 200. Concise Statement of the Act.

The act deprives Federal courts of "jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity" with its terms, and in further conformance to the public policy declared by the act. Section 2 sets forth the declaration of public policy which underlies the act. This section recognizes the helplessness of the individual unorganized worker, and the consequent necessity that he "have full freedom of association, self-organization and designation of representatives of his own choosing to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 3 provides that yellow-dog contracts or any other undertakings or promises in conflict with the policy declared in section 2, are unenforceable in any Federal court.

Federal courts are deprived of power to enjoin the doing, whether singly or in concert, of certain acts when done in connection with a "labor dispute," even though the acts might otherwise constitute an unlawful combination or con-

8. *Miller Parlor Furniture Co., Inc. v Furniture Workers Industrial Union*, 8 F Supp 209 (DCD NJ 1934). See also *Triplex Shoe Co. v Cantor*, 25 F Supp 996 (DC ED Pa 1939). *Contra Wucker Furniture Co. v Furniture Salesmen's Union*, 126 NJ Eq 145, 8 A(2d) 276 (1939).

spiracy. The following acts are insulated from injunction: (a) striking; (b) becoming or remaining a member of a labor organization or of an employer organization, notwithstanding the existence of a yellow-dog contract; (c) paying or withholding strike or unemployment benefits; (d) by all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in or is prosecuting any action or suit in any court of the United States or of any state; (e) giving publicity to the facts involved in a labor dispute by advertising, speaking, patrolling or by any other method not involving fraud or violence; (f) peaceably assembling in connection with the promotion of interests involved in a labor dispute; (g) advising or notifying any person of an intention to do any of the foregoing acts; (h) agreeing with other persons to do or not to do any of the foregoing acts; (i) persuading without fraud or violence the doing of the foregoing acts regardless of the fact that the person sought to be persuaded is bound by a yellow-dog contract

Given the doing of unlawful acts or of the existence of violence or fraud, the act provides that Federal courts shall have no power to issue a temporary or permanent injunction except after hearing in open court with opportunity for cross-examination and the showing, upon such hearing, of six circumstances: that (1) unlawful acts have been threatened and will be committed or will be continued unless restrained; (2) substantial and irreparable injury to complainant's property will follow; (3) as to each item of relief greater injury will be inflicted upon complainant by the denial than by the granting of relief; (4) complainant has no adequate remedy at law; (5) the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection; (6) the complainant has complied with all obligations imposed by law which are involved in the labor dispute and has made every reasonable effort to settle such dispute either by negotiation or with the aid of available governmental machinery of mediation, or voluntary arbitration.

Temporary restraining orders may issue without notice

but are effective for no longer than five days. Temporary restraining orders or temporary injunctions do not issue unless the complainant has first filed an undertaking with adequate security in an amount fixed by the court to save harmless those enjoined should it later be determined that the injunction was wrongfully obtained. Every restraining order or injunction is to include only a prohibition of the specific act or acts expressly complained of in the bill of complaint and expressly included in the findings of fact. Provision is made for speedy appeal.

Persons charged with contempt for violation of an injunction issued under the act are given the right to a speedy and public trial by jury in the district where the contempt was allegedly committed, but the right to trial by jury does not extend to the case where the contempt was committed in the presence of the court or so near thereto as to interfere directly with the administration of justice. In cases involving indirect contempt, the defendant may file with the court a demand for retirement of the Judge sitting in the proceeding, if the contempt arises from an attack from the character or conduct of the Judge.

The act abolishes the rule of vicarious liability in connection with any association or organization participating or interested in a labor dispute, section 6 of the act providing that liability shall not follow "except upon clear proof of actual participation in or actual authorization of such acts, or of ratification of such acts after actual knowledge thereof."

Since the act applies generally only in cases involving labor disputes, an exceedingly important part of the act constitutes the definition of the term "labor dispute." Section 13(c) of the act defines the term "labor dispute" to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in the proximate relation of employer and employee."

The act applies only to "any court of the United States

whose jurisdiction has been or may be conferred or defined or limited by act of Congress, including the courts of the District of Columbia" (section 13[d]).

Section 201. Method of Dealing with Cases Arising under Prototype State Anti-Injunction Acts.

Cases involving state anti-injunction acts patterned upon the Norris Act, other than those involving the meaning of the words "labor dispute," will be considered in the text hereafter, along with Federal court holdings interpretive of the Norris Act, because the substantial identity of language used both in State acts and the Federal act provides a common basis for evaluating the authority of the various decisions. The difference in meaning given to the term "labor dispute" by the Federal courts, as contrasted with that given to the same words by State courts, which are attributable mainly to the different constitutional backgrounds of the acts,⁹ make it necessary to separate Federal court from State court holdings in connection with the meaning of the term "labor dispute." Interpretations given by Federal courts to the words "labor dispute" are set forth at sections 209 to 212, while State court decisions interpreting state anti-injunction acts, including legislation fashioned after the Norris Act, are set forth hereafter at sections 438 to 450.

Section 202. Effect of Violence.

In *United Electric Coal Co. v. Rice*,¹⁰ the view was taken that violent labor activity is not within the purview of the Norris Act, even though the case otherwise involves a "labor dispute" under the act. In the *Rice* case the court quoted from the Congressional Reports leading up to the passage of the act, and concluded as follows: "the intention of Congress was thus clearly expressed. It was evidently not intended to take from courts of equity, jurisdiction of suits

⁹. See *infra*, section 436, for a junction legislation.

more detailed consideration of the 10. 80 F(2d) 1 (CCA 7, 1935),
different constitutional bases which cert den 297 US 714, 56 S Ct 590,
underlie Federal and State anti-in- 80 L Ed 1000 (1936).

to restrain unlawful acts or acts of violence." Such, too, was the holding of a New York Appellate Division in *May's Furs and Ready-To-Wear Inc. v. Bauer*,¹¹ where violent picketing was placed beyond the pale of section 876-a of the New York Civil Practice Act, (prototype of the Norris Act) although a "labor dispute" was apparently involved. But the holding of the Appellate Division was in this respect reversed by the Court of Appeals.¹² The high New York Court in the *Bauer* case thus summed up the fallacy underlying the argument that the existence of violence takes the case out of the purview of the anti-injunction act "Plaintiffs contend that the fact of extreme violence warrants the conclusion that the case at bar does not involve a labor dispute, and consequently is not subject to the restrictions contained in section 876-a. The fallacy of this argument is revealed by the fact that where a defendant has not been guilty of unlawful activities, perforce no injunction would issue even in the absence of section 876-a. The need for statutory safeguards can exist only where a defendant is guilty of some wrongdoing and is liable to injunctive restraint. The effect of the statute is to regulate the procedure by which an injunction may be obtained and to limit the scope of the relief which may be granted. The statute is rendered meaningless unless it is allowed to operate in those cases where plaintiff is entitled to some relief." The *Rice* case seems to be a lone exception to the general rule, which the Federal courts assume, that injunctions against violent labor activities are limited by the Norris Act if the case involves a "labor dispute."

There remains to be noted another case where a doubtful viewpoint was taken. In *Cater Construction Company, Inc. v. Nischwitz*¹³ it was held that an effort at settlement need not be made in cases involving violence on the part of a labor union. As hereafter pointed out,¹⁴ there is good argument for the proposition that this ought to be the law.

11. 255 AD 643, 8 NYS(2d) 819 (1939).

argument denied 282 NY 804, 27 NE (2d) 210 (1940)

12. *May's Furs, Inc v Bauer*, 282 NY 331, 26 NE(2d) 279 (1940), re-

13. 111 F(2d) 971 (CCA 7, 1940).

14. See *infra*, section 221

But the Norris Act has in the clearest terms said otherwise. The Act has said that it applies only to cases of unlawfulness and violence, in connection with cases involving labor disputes. To say, therefore, the efforts at settlement need not be made in connection with labor activities which are violent is to say that the Act does not apply to the only case where it is intended to apply.

Section 203. What Constitutes Fraud within the Meaning of the Act.

It has been held, in connection with the New York anti-injunction act which, as has been said, is a prototype of the Norris Act, that a misstatement made by a union in connection with a "labor dispute" constitutes fraud within the meaning of the anti-injunction act¹⁵ In *Wilson & Company v. Birl*,¹⁶ however, the court apparently held to the contrary, stating: "carrying placards stating that Wilson & Co. was unfair to organized labor may have been misrepresentative. It was not fraudulent." But in *Davis v. McGuigan*,¹⁷ and *Peak v. McElroy*¹⁸ "unfair" banners were restrained as false, in spite of the Pennsylvania anti-injunction act.

In *Pauly Jail Building Company v. International Association*,¹⁹ the defendants made representations that the strike which was called in that case resulted from the company's refusal to enter into a collective bargaining agreement with the union. There was a question, however, whether the union represented a majority of the company's employees, and it appeared, indeed, that it represented only a minority of the employees after a certain date. Having regard, therefore, for the provisions contained in the National Labor Relations Act in connection with the employer's duty to bargain only with the proper bargaining agency of his employees, the court said: "An implication so clear as to amount to a definite representation was given that the contract demanded by defendants was one which plaintiffs

15. *Grandview Dairy v. Leary* 158 Misc 701, 285 NYS 841 (1936).
 16. 105 F(2d) 948 (CCA 3, 1939).
 17. 36 Pa D & C 554 (1939).
 18. 33 Pa D & C 556 (1938).
 19. 29 F Supp 15 (DC ED Mo 1939).

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should properly sign or failing to do so be unfair to organized labor. That was not true. The agreement could not properly have been made with defendants and it constitutes fraud to directly or by implication represent to others that plaintiffs were unfair to defendants or organized labor on account of its refusal to make a collective agreement with them." The defendant's contention that the issue of the defendant's possession of a majority of bargaining authorizations was one for the National Labor Relations Board exclusively to resolve was met by the court with the statement "It is admitted that no election under the auspices of the Labor Board has ever been held and no certification by that Board has been made. Until that occurs defendants must show in some other manner their right to insist upon recognition as the sole bargaining agent of plaintiffs' employees and failing to do so, recede from their position as the representative of the majority."

1. CONSTITUTIONAL BASIS AND PUBLIC POLICY UNDERLYING THE ACT

Section 204. Provisions of the Act.

Section 1 of the act provides as follows: "No court of the United States, as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter." Section 2 sets forth the public policy underlying the act, as follows: "In the interpretation of this chapter and in determining the jurisdiction and authority of the courts of the United States, as such jurisdiction and authority are defined and limited in this chapter, the public policy of the United States is hereby declared as follows:

Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of

ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

In Pennsylvania, and in connection with a provision of the state anti-injunction act similar to Section 2 of the Norris Act, it has been held that the execution of a closed shop contract between an employer and a union which represented but one of the employer's 79 employees constituted a violation of the public policy therein declared.²⁰

Section 205. Application of the Act.

The Norris Act finds its constitutional source in the power possessed by Congress to regulate and define the jurisdiction of the federal courts. Unlike the Sherman Act which preceded it, and the National Labor Relations Act which followed it, the Norris Act is not an exercise of Congressional power over interstate commerce. The Norris Act is of profound importance to a study of the role of the judiciary in the control of American labor disputes history, since the federal courts under our judicial system have jurisdiction over controversies which take place wholly within the boundaries of any of the forty-eight states. The evolution and present status of federal labor relations law will be considered more

²⁰ *Tobin v. Shapiro*, 32 Pa D & C 291 (1938). See also *infra*, section 461.

fully hereafter, in concluding federal statutory enactments governing labor activity.²¹ It will suffice here to indicate the nature of the jurisdiction possessed by the federal courts, for the purpose of indicating the wide effect of the Norris Act. The Supreme Court of the United States is excluded from the operation of the Act, since deriving its powers not from Congress but rather from the federal constitution itself. The narrow sphere of original as distinguished from appellate jurisdiction possessed by the Supreme Court may be said to obviate any possibility of resort to that court for the purpose of evading any of the provisions of the act. The constitutionality of the Norris Act was the subject of great discussion after its enactment. In support of its constitutionality it was asserted that Congress possesses unqualified power over the jurisdiction of lower federal courts. Arguments against constitutionality, however, were by no means unpersuasive. It was contended first, that while Congress might limit equity jurisdiction over federal courts, it could not so qualify that jurisdiction as to destroy it, without abolishing the courts themselves. Courts, it was said, cannot be constituted as mere shells, without content usually associated with the very idea of courts. Secondly, the Act was alleged to have changed the substantive law within the state, by limiting a most effective procedural weapon possessed by federal courts. Substantive rights, the United States Supreme Court has held, must be surrounded by their most effective procedural remedies.²² That this was really the purpose of the Act was said to be borne out by the declaration of policy which introduced it. The significance which Mr. Justice Frankfurter, in a statement made before he took his place on the High Court, ascribed to the "reconstruction in the membership of the court" will be seen to have been not without some force for in *Lauf v. Shinner*,²³ the United States Supreme Court dis-

21. See *infra*, sections 414-423.

22. *Truax v. Corrigan*, 257 U.S. 312, 42 S. Ct. 124, 66 L. Ed. 254, 27 ALR 375 (1921).

23. 303 U.S. 323, 58 S. Ct. 578, 82 L. 596

Ed. 872 (1938). See also *Levering & Garrigues v. Morrin*, 71 F(2d) 281 (CCA 2, 1934), cert. den. 293 U.S. 595, 55 S. Ct. 110, 79 L. Ed. 688 (1934); *United Electric Coal Co. v. Rice*, 80

posed of the voluminous arguments pro and con by holding the Norris Act constitutional with the simple statement "There can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States."²⁴ The remedial nature of the Norris Act is illustrated by the case of *Levering & Garrigues Co. v. Morrin*,²⁵ where the Act was held applicable to cases commenced prior to its enactment

2 OUTLAWING THE YELLOW-DOG CONTRACT

Section 206. Provisions of the Act.

Section 3 of the Norris Act declares yellow-dog contracts to be in conflict with the public policy of the United States, and provides that such contract shall not be enforceable in any court of the United States whether at law or in equity. The language of the section is as follows. "Any undertaking or promise, such as is described in this section, or any other undertaking or promise in conflict with the public policy declared in section 102 of this chapter, is hereby declared to be contrary to the public policy of the United States, shall not be enforceable in any court of the United States and shall not afford any basis for the granting of legal or equitable relief by any such court, including specifically the following:

Every undertaking or promise hereafter made, whether written or oral, express or implied, constituting or contained in any contract or agreement of hiring or employment between any individual, firm, company, association, or corporation, and any employee or prospective employee of the same, whereby

F(2d) 1, cert den 297 US 714, 56 S Ct 590, 80 L Ed 1000 (1936)

²⁴ The contention that the granting of injunctive relief is an inherent attribute of an equity court so as to preclude statutory interference with that attribute of a kind which falls short of abolishing the court completely was brushed aside with out extended comment as untenable

in *Levering & Garrigues Co v Morrin* 71 F(2d) 284 (CCA 2 1934), cert den 293 US 595 55 S Ct 110, 79 L Ed 688 (1934). See also *Cinderella Theatre Co Inc v Sign Writers' Local Union*, 8 F Supp 209 (DC ED Mich SD 1934)

²⁵ 71 F(2d) 284 (CA 2, 1934) cert den 293 US 595, 55 S Ct 110, 79 L Ed 688 (1934)

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(a) Either party to such contract or agreement undertakes or promises not to join, become, or remain a member of any labor organization or of any employer organization; or

(b) Either party to such contract or agreement, undertakes or promises that he will withdraw from an employment relation in the event that he joins, becomes, or remains a member of any labor organization or of any employer organization."

Section 207. Background and Effect.

Although the Act does not forbid the making of a yellow-dog contract, nor, indeed, declare it to be illegal, enforcement thereof is prohibited, either at law or in equity. Any reason for execution of the yellow-dog contract is thereby eliminated. Under the Norris Act the yellow-dog contract bears the distinction of being a perfectly valid but remediless agreement. The background of the instant section should be considered in the light of the failure of the Clayton Act to mitigate the severity of holdings such as that handed down by the United States Supreme Court in the *Hitchman* case²⁶ In that case the court in effect restrained the introduction of unionism into fields covered by the yellow-dog contract. In an outstanding federal case subsequent to the *Hitchman* case, *International Organization U. M. W. A. v. Red Jacket Consolidated Coal & Coke Co.*,²⁷ where the issue was basically similar to that involved in the *Hitchman* case, counsel for the union contended anew that the Clayton Act necessitated a contrary result. To that contention, the court, per Parker, J., replied: "The inhibition of Section 20 of the Clayton Act against enjoining peaceful persuasion does not apply, as this is not a case growing out of a dispute concerning terms or conditions of employment between an employer and employees, between employers and employees, or between persons employed and persons seeking employment; but is a case

²⁶ 245 US 229, 38 S Ct 65, 62 1918B, 461 (1917).
L Ed 260, LRA1918C, 497, Ann Cas 27. 18 F(2d) 839 (CCA 4, 1927).
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growing out of a dispute between employers and persons who are neither ex-employees nor seeking employment. In such cases Section 20 of the Clayton Act has no application." The drastic injunction issued in that case forbade lawful speech in behalf of trade unionism in disregard of plain language of the Supreme Court in *American Steel Foundries v. Tri-City Central Trades Council*,²⁸ that the *Hitchman* case proceeded upon the theory that the union used deceitful means to accomplish its object. The intense hostility with which organized labor in America viewed the *Red Jacket* case is illustrated by the fact that when, in 1930, Judge Parker was nominated by President Hoover to a place on the United States Supreme Court Bench, the Senate by a vote of 41 to 39 refused their advice and consent thereto.²⁹ Public clamor, which had been partly responsible for Judge Parker's defeat, continued its effect to culminate in the instant provision of the Norris Act.

The section here discussed must also be understood in the light of our federal constitutional law, reference to which has already been made. Our federal government, being one of delegated functions, concededly has no power to enact substantive laws unless ancillary to a power delegated by the constitution. While it is true that the short-lived NIRA outlawed the yellow-dog contract by direct prohibition, the NIRA extended only to interstate commerce. The Norris Act, on the other hand, goes much further, as we have seen. In effect, it deals with those intra-state transactions which are susceptible to the jurisdiction of federal courts. Hence the Act speaks not in terms of substantive law but rather in the language of remedies available in federal courts.

3. WHAT CONSTITUTES A "LABOR DISPUTE" UNDER THE ACT

Section 208. Importance of Determining whether a "Labor Dispute" Exists.

The words "labor dispute" are terms of art, employed

²⁸ 257 US 184, 211, 42 S Ct 72, ²⁹ 72 Cong Rec 8487 (1930)
⁶⁶ L Ed 189, 27 ALR 360 (1921).

in connection with the Norris Act and prototype state legislation for the purpose of indicating the kind of dispute to which the acts extend. It is only in connection with a "labor dispute" that the enumerated acts set forth in section 4 of the Act are insulated from restraining orders or temporary and permanent injunctions. Again, it is only in cases involving a "labor dispute" that section 6, abolishing vicarious liability, applies. Finally, it is only where the case involves a "labor dispute" that the complainant must comply with the procedural requirements set forth in sections 7 and 8 of the Act. The term "labor dispute" is defined in section 13 of the Act to include "any controversy concerning terms or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether or not the disputants stand in approximate relation of employer and employee."

Section 209. Activities Which Have Been Held to Constitute "Labor Disputes."

The following labor activities have been held to constitute conduct giving rise to a "labor dispute." Picketing by negroes in protest against an employer who, though securing substantially all of his patronage from negroes, refuses to employ negro help;³⁰ picketing in the absence of a strike;³¹ picketing of a theatre, where the owners thereof were operating the theatre without any employees, having theretofore discharged their sole employee because of the union's demand that he be paid the union scale of

30 *New Negro Alliance v. Sanitary Grocery Co.* 303 U.S. 52, 58 S. Ct. 703, 82 L. Ed. 1012 (1938).

31. *Lauf v. Shinner*, 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 872 (1938); *Miller Parlor Furniture Co., Inc. v. Furniture Workers Industrial Union*, 8 F. Supp. 209 (DCD N.J. 1934); *Levering & Garrigues Co. v. Morrin*, 71 F. (2d) 284 (CCA 2, 1934), cert. den. 293 U.S. 595, 65 S. Ct. 110, 70 L. Ed.

698 (1934); *Coryell & Son v. Petroleum Workers Union*, 19 F. Supp. 749 (DCD Mo. Third Division, 1936); *S. S. Kresge v. Amaler* (DC Mo. 1937). For the relationship between the Norris Act, and the National Labor Relations Act, insofar as injunctive relief against picketing in cases involving competing unions is concerned, see *infra*, section 211.

wages;³² false bannering by pickets;³³ secondary strike;³⁴ strike or picketing for a closed shop;³⁵ the secondary boycott;³⁶ mass picketing, if peaceful and unaccompanied by acts of violence;³⁷ secondary picketing;³⁸ strike or picketing in breach of an agreement;³⁹ a suit by the C. I. O. to restrain employers and members of an A. F. L. union from carrying out the terms of a closed shop contract;⁴⁰ a suit to restrain the defendant from coercing his employees in the exercise of their right to elect their own bargaining representatives for collective bargaining under the Code of Fair Competition created by the National Industrial Recovery Act;⁴¹ a similar suit by members of an order of

32 *Rohde v. Dighton*, 27 F Supp 149 (DC WD Mo WD 1939)

33 *Lauf v. Shinner*, 303 US 323 58 S Ct 578, 82 L Ed 872 (1938) But see *Wilson & Co v. Birl* 105 F (2d) 948 (CCA 3, 1939) where the court drew a distinction between misrepresentative and fraudulent bannering, holding impliedly that while the former was legal the latter was illegal "Carrying placards stating that Wilson & Co. was unfair to organized labor may have been misrepresentative. It was not fraudulent."

34 *Levering & Co. v. Morrin* 71 F(2d) 284 (CCA 2, 1934), cert den 293 US 595 55 S Ct 110 79 L Ed 688 (1934) (threat). *Diamond Full Fashioned Hosiery Co. v. Leider*, 20 F Supp 467 (DC ED Pa 1937) *C/f Waterfront Employers of Portland Inc v. CIO* — F Supp — (DCD Or 1938) (jurisdictional dispute)

35 *Wilson & Co v. Birl*, 27 F Supp 915 (DC ED Pa 1939), aff'd 105 F(2d) 948 (CCA 3, 1939) Picketing to unionize is a "labor dispute" under the Act. *Consolidated Terminal Co. v. Drivers Local Union*, — F Supp — (DCD Col 1940)

36 *Wilson & Co. v. Birl*, 27 F Supp 915 (DC ED Pa 1939), aff'd 105 F(2d) 948 (CCA 3, 1939)

37 *Wilson & Co. v. Birl*, 27 F

Supp. 915 (DC ED Pa 1939), aff'd 105 F(2d) 948 (CCA 3, 1939)

38 *Wilson & Co v. Birl*, 27 F Supp 915 (DC ED Pa 1939) aff'd 105 F(2d) 948 (CCA 3, 1939) See also *Consolidated Terminal Co v. Drivers Local Union*, — F Supp — (DCD Col 1940)

39 *Wilson & Co v. Birl*, 27 F Supp 915 (DC ED Pa 1939) aff'd 105 F (2d) 948 (CCA 3 1939)

40 *Terrio v. Nielson Construction Company*, 30 F Supp 77 (DC ED Ia 1939)

41 *United States v. Weirton Steel Co* 7 F Supp 255 (DCD Del 1934) The motion for a temporary injunction was denied because of conflicting affidavits and the doubtful constitutionality of the National Industrial Recovery Act. See also *Stanley v. Peabody Coal Co* 5 F Supp 612 (DC SD Ill ND 1933) which was an action by a labor union to restrain the defendant from violating the provisions of the Code of Fair Competition for the Coal Industry under the National Industrial Recovery Act and from displaying the Blue Eagle as an emblem of compliance therewith. The application was denied for failure to meet the requirements of the Norris Act in cases involving "labor disputes"

Railway Conductors for a preliminary injunction to restrain interference with their selection of representatives for the purpose of collective bargaining under the Railway Labor Act.⁴²

The United States Supreme Court has held in *Virginian Rwy. Company v. System Federation*,⁴³ however, that the Norris Act must be taken as having been superseded by section 2, Ninth of the Railway Labor Act of 1926 as amended in 1934, and hence inapplicable to a controversy thereunder. The *Virginian Railway* case was a suit by a labor union to compel an interstate rail carrier to recognize and treat with the union as a bargaining representative duly accredited by the National Mediation Board and to enjoin further interference by the carrier with its employees' right under the Act freely to choose bargaining representatives pursuant to authority vested in the board by Section 2, Ninth of the 1934 amendment to the Railway Labor Act. The amended section made it the duty of the Mediation Board, upon a dispute arising among a carrier's employees "as to who are the representatives of such employees," to investigate the dispute and to certify the name of the organization authorized to represent the employees. The amended section further provides that "upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act." The complainant was duly certified, but the carrier refused to bargain, and assailed the decree entered by the court below for its failure to conform to section 9 of the Norris Act which, as we have seen, qualifies the issuance by federal courts of injunctions in any case involving a labor dispute by requiring findings of fact to be made as set forth by the Act. To this the court replied: "It suffices to say that the Norris-La Guardia Act can affect the present decree only so far as its provisions

42. *Myers v. Louisiana Ry. Co* 7 F Supp 92 (DC WD La Shreveport Division 1933). The motion for a temporary injunction was granted. See also *Cole v. Atlanta Terminal* 602

Co. 15 F Supp 131 (DC ND Ga Atlanta Division 1936).
43. 300 US 515, 57 S Ct 592 81 L Ed 789 (1937).

are found **not** to conflict with those of Section 2, Ninth, of the **Railway Labor Act**, authorizing the relief which has been granted. Such provisions cannot be rendered nugatory by the earlier and more general provisions of the **Norris-La Guardia Act**."

Section 210. Activities Which Have Been Held Not to Constitute "Labor Disputes."

The following have been held to be activities not giving rise to a "labor dispute" and hence without the purview of the insulation against injunction afforded by the **Norris Act**:

1. Picketing, where part of a plan and conspiracy to restrain and interfere with interstate commerce, in violation of the **Sherman Act**.⁴⁴ But it has been held that the mere fact that the activities of a labor union in connection with a labor controversy cause a reduction in the shipment of the plaintiff's products in interstate commerce does not entitle the plaintiff to relief under the **Sherman Act**, unless it appears also that the activities are unlawful and that they were intended to restrain interstate commerce.⁴⁵ It has also been held by one court, which assumed the inapplicability of the **Norris Act** to cases involving unlawful acts directed against interstate commerce, that a business which, when active, has shipped goods in interstate commerce, cannot invoke the **Sherman Act** so as thereby to

44. *Mayo v Dean*, 82 F(2d) 554 (CCA 5, 1936) aff'g 9 F Supp 459 (DC WD La Lake Charles Division 1935) and reversing 8 F Supp 73 (DC WD La Lake Charles Division 1934); *Fehr Baking Co. v Bakera Union*, 20 F Supp 691 (DC WD La Lake Charles Division 1937), *Waterfront Employers of Portland, Inc v C.I.O.* — F Supp — (DC Or 1938) (jurisdictional dispute)

45. *Wilson & Co. v. Birl*, 27 F Supp 915 (DC ED Pa 1939), aff'd 105 F (2d) 948 (CCA 3, 1939), *Levering & Garrigues Co. v. Morrin*, 289 US 103, 53 S Ct 549, 77 L Ed 1062 (1933);

c/f *Cinderella Theatre Co Inc v Sign Writers Local Union*, 6 F Supp 164 (DC ED Mich SD 1934) where the court said "I express no opinion as to whether an injunction in a labor dispute against a combination or conspiracy in restraint of interstate commerce comes within section 5 of the Act prohibiting an injunction upon the ground that any of the persons participating or interested in a labor dispute constitute or are engaged in an unlawful combination or conspiracy because of the doing in concert of the acts enumerated in section 4"

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exclude the Norris Act, where at the time injunctive relief is requested, the business has ceased activity and is in the process of liquidation⁴⁶ In *Pauly Jail Building Company v. International Association*,⁴⁷ it was held that an illegal conspiracy to restrain interstate commerce constitutes a "labor dispute" under the Norris Act, but that such a conspiracy is an unlawful act within the meaning of Section 7(a) of the Act, so that injunctive relief may be obtained if the other conditions set forth in Sections 7 and 8 are satisfied.

2. Picketing and otherwise interfering with the dismantling of a plant, where the employer has sold the plant machinery, laid off his workers, and discontinued operations⁴⁸ But in one case it was held that in such a case a "labor dispute" existed, and that, moreover, the former employer was not entitled to an injunction because, not being engaged in an active business, his legal remedy in the form of damages was so adequate as to preclude the petitioning of a court of chancery⁴⁹

3 Secondary picketing, by a union which had refused to furnish men to the plaintiff employer, although requested to do so, had repudiated a contract thereafter entered into, and had indicated that its sole purpose in picketing was to prevent the employer from entering the field in competition with other employers⁵⁰

4 Secondary boycotting⁵¹

5. Labor activity of any kind, in connection with a business which is in the process of reorganization under section 77B of the Bankruptcy Act,⁵² unless the jurisdiction of

46. *Oswald v. Leader*, 20 F Supp 876 (DC FD Pa 1937)

47. 29 F Supp 15 (DC ED Mo 1939)

48. *Diamond Full Fashioned Hosiery Co. v. Leader*, 20 F Supp 467 (DC FD Pa 1937), app dis 99 F (2d) 1001 (CCA 3, 1937)

49. *Oswald v. Leader*, 20 F Supp 876 (DC ED Pa 1937)

50. *Scavenger Service Corp. v.*

Courtney, 85 F(2d) 825 (CCA 7, 1936)

51. *Fehr Baking Co v Bakers Union*, 20 F Supp 691 (DC WD La Lake Charles Division 1937), *Lake Valley Farm Products, Inc. v Milk Wagon Drivers' U* 108 F(2d) 436 (CCA 7, 1939)

52. *In re Cleveland & Sandusky Brewing Co* 11 F Supp 198 (DC ND Ohio ED 1935), criticized in 49 Harv L Rev 341 (1936)

the Bankruptcy court is invoked for the purpose of escaping labor controversy.⁵³

6. Picketing the stores which sell milk purchased from a dairy company with whom the picketing union is engaged in a controversy, where (1) a restraint upon interstate commerce is thereby effected, in violation of the Sherman Act; (2) the purpose of the picketing is to compel the dairy company to distribute milk through members of the picketing union instead of through independent contractors, (3) such independent contractors were not eligible for membership in the union unless they gave up their business as independent contractors.⁵⁴

Section 211. Cases Involving Competing Unions.

The question as to whether a strike, picketing or boycotting gives rise to a "labor dispute" under the act so as to be insulated from injunction except in accordance therewith, when employed by a union representing a minority of the employer's employees, has presented a perplexing situation involving construction not only of the Norris Act, but of the National Labor Relations Act as well. Section 9 (a)⁵⁵ of the National Labor Relations Act provides that "Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment . . ." while section 8(3)⁵⁶ of the Act declares it to be an unfair labor practice for an employer. "By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ." and section 8(5)⁵⁷ of the Act declares it to be an unfair la-

⁵³ *In re Cleveland & Sandusky Brewing Co* 11 F Supp 198 (DC ND Ohio ED 1935) (dicta) 108 F(2d) 436 (CCA 7, 1939)
⁵⁵ 29 USC sec 159 (a).
⁵⁶ 29 USCA sec 158 (3)

⁵⁴ *Lake Valley Farm Products, Inc v Milk Wagon Drivers' Union*, 57. 29 USCA sec 158 (5).

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bor practice for an employer "to refuse to bargain collectively with the representatives of his employees. . . ." Section 13 of the Act provides that "Nothing in this act (chapter) shall be construed so as to interfere with or impede or diminish in any way the right to strike." Finally, Section 2(9) of the Act defines a "labor dispute" to include "any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee," so that the definition of the words "labor dispute" in the Act is identical with that contained in the Norris Act, except that the National Labor Relations Act adds the word "tenure" to the matters as to which a controversy constitutes a "labor dispute."

Employers subjected to strikes, picketing or boycotting by unions representing less than a majority of employees have sought relief by way of injunction upon the theory that the given labor activity does not constitute a "labor dispute" for two main reasons. The first reason advanced is that the dispute is not between an employer and his employees, but simply one between two groups of employees. Such a dispute, it is said, is one which the National Labor Relations Act was passed to resolve. The definition of the words "labor dispute," it is pointed out, is substantially the same under both the Norris Act and the National Labor Relations Act. To the extent, therefore, that the latter act has conferred upon a governmental agency jurisdiction to determine the proper group to act as employees' representatives for the purpose of collective bargaining, the prior enacted Norris Act has been qualified by the subsequently passed National Labor Relations Act. A holding by the United States Supreme Court⁵⁵ to the effect that the provisions of the 1932 Norris Act must be taken to have been superseded

⁵⁵ *Virginian Ry. Co. v. System Federation*, 300 US 515, 57 S Ct 592, 81 L Ed 789 (1937).

by the **Railway Labor Act** as amended in 1934 to the extent necessary to carry out the provisions of the latter act is cited in support of the contention. The second reason advanced is that the act makes it unlawful as constituting an unfair labor practice for an employer to bargain with any but the representative of a majority of his employees in a given bargaining unit. Hence, it is asserted, a strike, picketing or boycott which has as its aim the coercing of the employers into bargaining with representatives not authorized to bargain by a proper majority of employees is unlawful because seeking to coerce the doing of an illegal act.

Labor unions, on the other hand, have argued to the contrary. Their contentions may also be generalized as being two-fold. First, it is asserted that the similarity in definition of the words "labor dispute," as contained in the Norris and National Labor Relations Act, indicates that everything cognizable under the latter act is likewise a "labor dispute" under the former act. Second, it is argued that the National Labor Relations Act, by expressly reserving to labor in section 13 (*supra*) thereof the right to strike has, thereby, indicated care to preserve labor's economic weapons. It is added that neither the Norris Act nor the National Labor Relations Act was passed to restrict labor activity, but on the contrary, both statutes were enacted to enlarge labor's rights. To restrict labor activity under either act therefore, or under a construction of both, is to disregard the purposes of the acts.

The courts have generally agreed with labor's viewpoints and have refused to issue injunctions under the Norris Act against labor activity undertaken by minority unions except in accordance with the provisions thereof in cases involving "labor disputes."⁵⁹ The first line of decisions hav-

59. It is to be noted, however, that while injunctions may not be issued in such cases under the Norris Act, labor activities carried on under such circumstances may be subjected to criminal prosecution under the Sherman Act if restraint of interstate commerce is thereby effected. See

infra, sections 420-422. Thus in *United States v. International Brotherhood of Teamsters*, 32 F Supp 594 (DCD Col 1940), it was held that labor activity carried on by one union in restraint of an employer's business is criminally punishable under the Sherman Act, where the em-

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ing relation to this subject involves cases wherein an employer, under contract with the bargaining representative of a majority of his employees, sues to restrain labor activity by a minority union. In *Lund v. Woodenware Workers' Union*,⁶⁰ where the plaintiff who had entered into a collective bargaining agreement with what appeared to be a representative of a majority of his employees sought to enjoin a strike called by a union representing a minority of his employees, the complaint was dismissed, the court saying that Congress "did not intend to limit in any way the actions of the minority in protesting against the agreements of the majority and generally in taking legal measures by strike to achieve redress of alleged grievances."⁶¹

ployer had theretofore entered into a contract with a labor union which represented a majority of the employees and was hence entitled to the status of appropriate and exclusive bargaining agent under the National Labor Relations Act.

60 19 F Supp 607 (DCD Minn Third Division 1937). *Accord* *Grace Co. v. Williams*, 20 F Supp 263 (DC WD Mo WD 1937), *aff'd* 96 F(2d) 478 (CCA 8, 1938), *Fur Workers Union, Local No 72 v Fur Workers Union*, 105 F(2d) 1 (CA DC 1939) *aff'd* 308 US 522 60 S Ct 292, 84 L Ed 443 (1939), *Donnelly Garment Co. v. I. L. G. W. U.* 23 F Supp 998 (DC WD Mo WD 1938) *rev'd on another ground* 99 F(2d) 309 (CCA 8, 1938), *cert. den* 305 US 662, 59 S Ct 364, 83 L Ed 430 (1939), *International Brotherhood v International Union*, 106 F(2d) 871 (CCA 9, 1939).

61. In this case the plaintiff sought to invoke the jurisdiction of the federal court not upon the theory of diversity of citizenship but "on the theory that, when the majority of the employees have elected their representatives for collective bargaining, and a bargain is so made by them with the employer, the Wagner-Connelly Labor Relations Act makes

unlawful any course of conduct by the minority employees which tends to interfere with the agreement." But the court held that this was not a basis for federal jurisdiction under the Act. "A reading of the Wagner Act impels the view that it was passed primarily to eliminate unfair labor practices on the part of employers, to guarantee to the employees the right of organization, and to secure the right to bargain collectively through representatives of their own choosing. There is no express provision in the act which seeks to affect, limit or curb unfair practices on the part of labor towards the employer. Unquestionably the contract that plaintiff contends he has entered into with the representatives of the majority of his employees may be entirely valid but the mere fact that the employer has made a valid contract with his employees does not, of itself give rise to any justiciable controversy in federal courts under the Act." *Accord* *Blankenship v. Kurfman*, 96 F(2d) 450 (CCA 7, 1938). *Cf.* *Grace Co. v. Williams*, 20 F Supp 263 (DC WD Mo WD 1937) *aff'd* 96 F(2d) 478 (CCA 8, 1938).

While, however, picketing under

In a second class of cases, neither of the competing labor unions has sought the aid of the Board to resolve the issue of majority representation, one or both of them preferring by strike, picket or boycott to compel collective bargaining or to achieve a given purpose. In *Sharp & Dohme v. Storage & Warehouse Employees Union*,⁶² a neutral employer was denied an injunction against a strike called by a union which appeared to represent much less than a majority of his employees, the court saying that the union's right to petition the National Labor Relations Board for certification was merely an alternative to the right to strike to compel the signing of a collective bargaining agreement.

A third line of cases are those where, though no contract has as yet been entered into, the question of representation is pending before the National Labor Relations Board for disposition. In *Black Diamond Steamship Corporation v. National Labor Relations Board*,⁶³ employees who struck while the Board was conducting an election were held not to have given up thereby any of their rights under the National Labor Relations Act. And in *Cupples Company v. American Federation of Labor*,⁶⁴ an injunction was denied to an employer to restrain a strike called by one of competing unions in consequence of the employer's refusal to recognize it as the sole bargaining agent of its employees, although it appeared that at the time the strike was called

such circumstances is held to constitute a "labor dispute" under the Norris Act so as to be unenjoinable except in accordance with the provisions of the Act, it has also been held that the plaintiff need not allege or prove efforts at settlement with the picketing union since, being under contract with the proper bargaining agency of the employees, efforts at settlement with the minority union or union not having any employees at the plaintiff's plant or place of business would be violations of section 8(5) of the National Relations Act. *Donnelly Garment Co. v. Int'l Ladies Garment Workers Union*, 99

F(2d) 309 (CCA 8, 1938), cert den 305 U S 662, 59 S Ct 364, 83 L Ed 430 (1919). *Cater Construction Company, Inc. v. Nischwitz*, 111 F(2d) 971 (CCA 7, 1940). See *May's Furs, Inc. v. Bauer* 282 NY 331, 26 NE(2d) 279 (1940), reargument den 282 NY 804 27 NE(2d) 210 (1940).

⁶² 24 F Supp 701 (DC ED Pa 1938)

⁶³ 94 F(2d) 875 (CCA 2, 1938), cert den 304 U S 579, 58 S Ct 1044, 82 L Ed 1542 (1938)

⁶⁴ 20 F Supp 894 (DC ED Mo ED 1937). See *Cole v Atlanta Terminal Co* 15 F Supp 131 (DC ND Ga Atlanta Division, 1936)

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the Board had assumed jurisdiction to determine which agency the employer should recognize. But in *Union Premier Food Stores v. Retail Food Co. & M. Union*,⁶⁵ it was held that where the question of representation is pending before the National Labor Relations Board, an injunction will be granted restraining picketing by one of the competing unions. The court said: "In such a case as we have here, where the controlling and only question is which of two labor unions is the collective bargaining agent of the employees of the plaintiffs, and the employers take no part in such dispute, but, on the contrary, are willing to abide by the decision of the Board and contract with the union it designates, it is manifest that the Board and it alone, has jurisdiction to decide that question. . . ."

A fourth line of cases involves picketing by one of competing unions, after certification by the National Labor Relations Board of another union as the exclusive bargaining representatives of the employer's employees. In *Oherman v. United Garment Workers*⁶⁶ picketing under such circumstances was enjoined as not involving a "labor dispute" under the Norris Act.

The fifth class of cases are those wherein an agreement is entered into between an employer and a union representing a majority of his employees. Thereafter, the employees covered by the agreement become dissatisfied either with the agreement or the union and change their affiliation to another union. Picketing under such circumstances by the new union is held illegal.⁶⁷

Section 212. Legality of Purpose.

It has been seen that the rights to strike, picket or boycott or otherwise to engage in labor activities, are qualified under existing jurisprudence to the extent that, to be legal,

65. 98 F(2d) 821 (CCA 3, 1938).

66. 21 F Supp 20 (DCWD Mo 1937).

67. *M. & M. Woodworking Co. v. Plywood & Veneer Workers Union*, 23 F Supp 11 (DCD Or 1938) (actual issuance of the injunction was with-

held pending amendment of the complaint); *United Electrical Coal Cos. v. Rice*, 86 F(2d) 1 (CCA 1935), cert den. 297 US 714, 56 S Ct 590, 80 L Ed 1000 (1936) *C/I Lauf v. Shinner*, 303 US 323, 58 S Ct 578, 82 L Ed 872 (1938).

they must be for a lawful purpose.⁶⁸ The factors which go into the making of lawful purpose have heretofore been considered.⁶⁹ Has the Norris Act changed the criterion of lawfulness if the particular activity involves a "labor dispute" under the act? It would seem that the answer to this question must be in the affirmative, because cases connected with violence or fraud are the only exceptions to the limitations which the Norris Act places upon the injunctive powers of lower Federal courts. In *Wilson & Co. v. Birl*,⁷⁰ the court construed the act in general, and section 4(a) of the act in particular as follows: "a strike, therefore, cannot be enjoined. Whether or not the strike in this case is illegal, because of its purpose, as argued by appellant is, therefore, beside the point. The test is no longer given the uncertain elasticity of 'illegality.' The statute, dealing strictly with procedure, nowhere attempts to define as lawful the acts which it says may not be enjoined." The words of the United States Supreme Court in the case of *New Negro Alliance v. Sanitary Grocery Company*⁷¹ where picketing by negroes in protest against the employment of whites by an employer who derived most of his business from negroes was held to constitute a "labor dispute," are also in point. The court said: "the act does not concern itself with the background or the motives of the dispute."

Nevertheless, it is not at all clear that the lower federal courts are uniformly of the same mind. Thus, it has been said that the Norris Act applies only to labor controversies related to the historical purposes of labor activity, and hence that picketing to compel an employer to join an employers' association is illegal.⁷² It has also been seen that labor activities which restrain interstate commerce has

68. See *supra*, sections 84-102, 114, 149

69. See *infra*, sections 69-77

70. 105 F(2d) 948 (CCA 3, 1939)

71. 303 US 552, 58 S Ct 703, 82 L Ed 1012 (1938).

72. *Converse v Highway Construction Company*, 107 F(2d) 127 (CCA 6,

1039) The property was in the hands of the Bankruptcy Court and the Court held that the Norris Act was inapplicable to such a situation, but took occasion to discuss the Norris Act, and said that the Act would be inapplicable to the controversy even if otherwise applicable

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been held to come without the purview of the Norris Act.⁷³ Other purposes and situations connected with labor activity have been held illegal and not within the scope of the protective provisions of the Norris Act.⁷⁴

4. ACTIVITIES UNENJOINABLE IF CONNECTED WITH A "LABOR DISPUTE"

Section 213. Provisions of the Act.

Section 4 of the act deprives lower Federal courts of jurisdiction to issue restraining orders or temporary or permanent injunctions in any case involving activity carried on in connection with a "labor dispute." The language of the statute is as follows: "No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this chapter;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

73. See *supra*, section 210.

74. See *supra*, section 210.

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this chapter."

Section 214. Legality of Picketing.

In *American Steel Foundries v. Tri-City Central Trades Council*,⁷⁶ the United States Supreme Court made the observation that the Clayton Act had refrained from using the "sinister" word "picketing" and consequently branded that form of activity with the stamp of illegality. Apparently impelled by the desire to obviate the consequences of the *American Steel Foundries* case, the Norris law enacted as one of the specific types of conduct insulated from injunctive interference by federal courts, "giving publicity to the existence of, or the facts involved in, any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence."⁷⁶ In *Knapp-Monarch Co. v. Anderson*⁷⁷ it was accordingly held that since Congress refrained from using the word "picketing" in the Norris Act, a Congressional intention was thereby indicated to leave in the federal courts, jurisdiction to restrain, if necessary, any picketing of a coercive, intimidating character. The *American Steel Foundries* case was cited by the court in support of its holding. The law has a peculiar way of changing its outward forms while retaining former rules and principles. The *Knapp* case, however, is decidedly against the great weight of authority, which expressly or impliedly construes the word "patrolling" to mean "picketing."⁷⁸

⁷⁶ 257 U.S. 184, 42 S. Ct. 72, 60 L. Ed. 180, 27 ALR 360 (1921). ⁷⁷ 7 F. Supp. 332 (DC ED Ill. 1934).
⁷⁸ 47 Stat. 70 (1932), 20 U.S.C.A. ⁷⁸ See *Lauf v. Shinner*, 303 U.S.

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5. PROCEDURAL REQUIREMENTS WHICH CONDITION ISSUANCE OF INJUNCTION IN ANY CASE INVOLVING A "LABOR DISPUTE"

Section 215. Provisions of the Act.

Sections 7 and 8 of the Act set forth procedural requirements, the satisfaction of which are necessary as conditions to the issuance of injunctive relief under the act. In sections 7 and 8 are to be found the most profound innovations which the Norris Act has introduced into the law. The two most novel and drastic of the rules set forth in sections 7 and 8 of the act are: (1) that the public authorities charged with keeping the peace have been unwilling or have failed to give protection to the complainant, and (2) that the complainant has made every reasonable effort to settle the dispute either by negotiations or with the aid of governmental machinery of mediation or voluntary arbitration. With respect to the first requirement, it is asserted by those opposed to some of the provisions of the Norris Act that unlawful activity connected with a labor dispute is not often susceptible of police protection, that it is in contravention of the long settled principle governing equity jurisdiction to the effect that equity may take jurisdiction over the commission of criminal acts where those acts cause private injury to the complainant, and that a complainant whose business has been impaired by unlawful labor activity should not be put to the obligation of instituting criminal proceedings in connection with each and every wrong but that he should be afforded the opportunity of obtaining judicial determination of the right and

323, 58 S Ct 578, 82 L Ed 872 (1938); *Wilson & Co v. Birl*, 27 F Supp 915 (DC ED Pa 1939) aff'd 105 F(2d) 894 (CCA 3, 1939). *Miller Parlor Furniture Co Inc v. Furniture Workers Industrial Union*, 8 F Supp 209 (DCD NJ 1934); *Levering & Garrigue Co v. Morrin*, 71 F(2d) 284 (CCA 2, 1934) cert. den 293 US 595, 55 S Ct 110, 79 L Ed 288 (1934); *Cinderella Theatre Co. v. Sign Writ-*
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ers Local Union, 6 F Supp 164 (DC ED Mich SD 1934); *Coryell & Son v. Petroleum Workers Union*, 19 F Supp 749 (DCD Minn, Third Division, 1936); *S. S. Kresge v. Amsler* (DCD Mo 1937). "The word 'patrolling' in the federal statute means 'picketing.'" *Wucker Furniture Co. Inc. v. Furniture Salesmen's Union*, 126 NJ Eq 145, 8 A(2d) 275 (1939).

wrong involved in the entire controversy for the purpose of guiding all the parties in connection with future developments of the dispute.

In connection with the second requirement, the voices of protest have been more voluble. Since the act permits injunctions only in cases involving violence or fraud it is said to impose by this requirement a duty upon the complainant to bargain with his despoilers.

Section 7 of the Act provides as follows: "No court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute, as herein defined, except after hearing the testimony of witnesses in open court (with opportunity for cross-examination) in support of the allegations of a complaint made under oath, and testimony in opposition thereto, if offered, and except after findings of fact by the court, to the effect—

(a) That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof;

(b) That substantial and irreparable injury to complainant's property will follow;

(c) That as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief;

(d) That complainant has no adequate remedy at law; and

(e) That the public officers charged with the duty to protect complainant's property are unable or unwilling to furnish adequate protection.

Such hearing shall be held after due and personal notice thereof has been given, in such manner as the court

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shall direct, to all known persons against whom relief is sought, and also to the chief of those public officials of the county and city within which the unlawful acts have been threatened or committed charged with the duty to protect complainant's property: Provided, however, That if a complainant shall also allege that, unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable, such a temporary restraining order may be issued upon testimony under oath, sufficient, if sustained, to justify the court in issuing a temporary injunction upon a hearing after notice. Such a temporary restraining order shall be effective for no longer than five days and shall become void at the expiration of said five days. No temporary restraining order or temporary injunction shall be issued except on condition that complainant shall first file an undertaking with adequate security in an amount to be fixed by the court sufficient to recompense those enjoined for any loss, expense, or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court.

The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

The provisions of section 8 are as follows: "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation im-

posed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration"

It has been held by the United States Supreme Court that failure by the complainant to allege and prove all the requirements and by the district court to make all the findings of fact set forth by these sections is fatal to the complainant's right to injunctive relief.⁷⁹ This is contrary to high court decisions interpreting the Clayton Act, it having been held that disregard of the requirements of section 19⁸⁰ of that Act, to the effect that every order for an injunction shall set forth reasons for the issuance thereof, does not necessarily render a temporary injunction void.⁸¹

Section 216. Restraint of Unlawful Acts.

The provision of the statute (section 7[a]) which must be satisfied in this connection reads, as has been seen, as follows "That unlawful acts have been threatened and will be committed unless restrained or have been committed and will be continued unless restrained, but no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof." The finding here required is not an innovation to the law, but on the contrary, has been a basic condition to the issuance of the mandate of injunction. The purpose of injunctive relief is well understood to be that of preventing future wrongdoing and not that of affording a remedy for past injuries.⁸² A determination of such question by a

79. *Lauf v Shinner*, 303 US 323 58 S Ct 578, 82 L Ed 872 (1938)

80 38 Stat 730, 28 USCA section 383

81. *Lawrence v St Louis San Francisco Ry. Co.* 274 US 588, 47 S Ct 720, 71 L Ed 1219 (1927), *Arkansas*

Railroad Commission v Chicago R I & P R Co 274 US 597, 47 S Ct 724, 71 L Ed 1221 (1927)

82. *Sasser v Harris* 178 NC 322, 100 SE 338 (1919), where an injunction was denied to restrain an election already held, *White v Wood*,

trial court will not ordinarily be disturbed on appeal.⁵³

This finding must be made independently of the others required by the Act and hereafter to be considered. It has accordingly been held that a finding of irreparable injury is not sufficient and does not by implication include a finding of the probability of future lawlessness, and consequently that, in addition to a finding of irreparable injury, the court must also find that unlawful acts will, unless restrained, probably be committed in the future.⁵⁴ Of course, the finding of probability of future unlawfulness involves a large area of judicial discretion. The applicable section of the Clayton Act failed to include the instant requirement among those which conditioned the issuance of injunctive relief.⁵⁵ In *Knapp-Monarch Co. v. Anderson*,⁵⁶ the stoning of the plaintiff's cars was held to be a fact "from which it is reasonably inferable that other such violence to the physical property of the plaintiff will recur unless prevented" where it further appeared that there was mass picketing and that the plaintiff's business was seasonal in nature. It may probably be laid down as a rule that an isolated act of unlawfulness will not or at least should not lay the foundation for the finding here discussed, but it is impossible to state the degree of repetition necessary to support the inference of future repetition. It has been held under the New York Anti-Injunction Act that an injunction will not issue to restrain picketing where it appears that the picketing occurred almost a week prior to the signing of the order to show cause, continued for a single day and was not repeated.⁵⁷ A further source of uncertainty is the practice indulged in by the courts of making the findings required by the Act, without stating the facts asserted to lay the foundation for the findings.

129 NY 527, 29 NE 835 (1892), where injunctive relief was refused to restrain conveyance already completed.

53. *Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co.* 215 Wis 623, 256 NW 56 (1934).

54. *Lauf v. Shinner*, 303 US 323,

58 S Ct 578, 82 L Ed 872 (1938).

55. 38 Stat 730, sec. 20, 29 USCA sec. 52.

56. 7 F Supp 332 (DC ED III 1934).

57. *Darby Bar & Grill, Inc. v. International Brotherhood*, 104 NYLJ 253 (S Ct NY Co 1940).

The fact that unlawful acts have been threatened has, in some cases, been held no ground for the issuance of an injunction, where no overt act has been committed.⁸⁸ On the other hand, the existence of a threat to commit future injury has been held inferable from acts done in the past.⁸⁹ In *Ellingsen v. Milk Wagon Drivers' Union*,⁹⁰ the defendant union engaged in a campaign of secondary picketing in the course of which it threatened to picket all fifty-seven of the plaintiffs' stores, but it actually picketed only four of them. The court nevertheless entered an injunction restraining the union from picketing all of the stores, and not simply the four actually picketed. The court explained its reason for so holding by stating: "While a court of chancery will not grant an injunction to allay mere fears and apprehensions, but to protect against acts which are not only threatened but which will in all probability be committed to the injury of the complainant, yet, where there is an allegation based upon proof that unless restrained the defendants will carry out their threats to commit such injury, injunction will lie to restrain such action, although, so far as the plaintiff is concerned, such damage may not yet have taken place."

In *Pauly Jail Building Company v. International Association*,⁹¹ it was held that a secondary strike and secondary boycott accompanied by fraudulent statements involving the channels of interstate commerce constitute an unlawful conspiracy in restraint of interstate commerce in violation of the Sherman Act, and that such activities are unlawful acts within the meaning of Section 7(a) of the Act.⁹² It was also held in this case that labor activity carried on by

88. *Bond v. Wool*, 107 NC 139, 12 SE 281 (1890); *Barber v. Smith*, 48 Kan 331, 29 P 565 (1892).

89. *Newton v. Mahoning Co.* 26 Ohio St 618, aff'd 100 US 548, — S Ct —, 25 L Ed 710 (1880); *Western Union Teleg. Co. v. Guernsey*, 46 Mo App 120 (1891).

90. — NE(2d) — (Ill 1940).

91. 29 F Supp 16 (DC ED Mo

1939).

92 The holding of the case to such effect is not in accord with the holdings of the greater number of cases, which reason that labor activities which restrain interstate commerce in violation of the Sherman Act are not "labor disputes" within the meaning of the Norris Act. See *supra*, section 210.

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a union which does not represent a majority of the employer's employees is unlawful where coupled with false statements made by the union which gave the impression to the community and to the trade that the plaintiff refused to enter into collective bargaining negotiations with the proper bargaining agency of its employees.

Section 217. Substantial and Irreparable Injury.

Section 7(b) of the statute, which must be satisfied in connection with the requirement that there be substantial and irreparable injury, provides that it is necessary, as a condition to the granting of injunctive relief under the act "that substantial and irreparable injury to complainant's property will follow."

A showing of irreparable injury has been necessary to open the doors of Chancery since the earliest of times. Irreparable injury is legal wrongdoing which an action at law for damages will not adequately compensate. The addition of the word "substantial" in the Norris Act⁹³ is of little consequence. It is true that injury may be irreparable though damage be small.⁹⁴ Injury which is irreparable will, however, especially in labor cases, also be substantial. The notion of adequate compensation in connection with the definition of irreparable injury is imperfectly set forth in the cases, and this is especially true of labor cases. When the notion is properly understood as it is applied to the case of a business whose profitable continuance is impeded by a strike, picket or boycott, it will be seen that the requirement of irreparable injury is small if any obstacle to the obtaining of injunctive relief. It is now fairly well settled that one may recover in an action at law, damages for loss of future profits arising from wrongful interference with a business.⁹⁵ Past and present profits are proper to indicate

93. The Clayton Act uses the word "irreparable" without the addition of the word "substantial." 38 Stat. 730, sec. 20, 29 USCA sec 52. See *Yuengling v Johnson*, F Cas No. 18, 195 (CCA Va 1877); *Ryan v Seaboard & R. R. Co.* 89 F 385 (CCA Va 626

1494)
94. *Wahle v. Reinbach*, 76 Ill 322 (1875); *Lead v. Inch*, 116 Minn 467, 134 NW 218 (1912).

95. *Central Coal & Coke Company v. Hartman*, 111 F 96 (CCA 8, 1901); *Rankin Company v. Associated Bill*

the measure of damages.⁹⁶ If this be true, it will be asked, why is not the action at law for damages so adequate as to preclude the petitioning of equity? Logically, but two arguments are possible in view of the possibility of recovering adequate damages, to justify the invoking of the mandate of equity. First, it may be pointed out that the labor union or its members may be or eventually prove to be insolvent, thereby according to the business man a right, of dubious value, to execute against property where little or no property exists which is capable of execution. Second, it may be contended that one may not yet have established a business such as to lay the foundation for the assessment of damages, as where one's business is picketed or boycotted immediately upon its inception. With respect to the first point, it must be admitted that there is some force to the contention that a labor union's insolvency may provide the inadequacy

Posters, 42 F(2d) 152 (CCA 2, 1930) cert den 242 US 864, 51 S Ct 37, 75 L Ed 765 (1930). *Frey & Son v Welch Grape Juice Co*, 240 F 114 (CCA 4, 1917), *Barnes v Midland R R Co* 218 NY 91, 112 NE 926 (1916), *Snow v Pulitzer*, 142 NY 263, 36 NE 1059 (1894). *Cramer v Grand Rapids Show Case Co* 223 NY 63, 119 NE 227, 1 ALR 154 (1918).

96. *Eastman Kodak Company v Southern Photo Material Co* 273 US 395, 47 S Ct 400, 71 L Ed 684 (1927), *Schille v Brokhaus* 80 NY 614 (1880), *Rankin Co v Associated Bill Posters*, 42 F(2d) 152 (CCA 2, 1930) cert den 282 US 864, 51 S Ct 37, 75 L Ed 765 (1930). Failure to recognize this rule has occasioned in some cases incorrect language to the effect that injunctions are granted to employers because the amount of damages cannot reasonably be calculated. Thus in *Crouch v Central Labor Council*, 293 P 729 (Or 1930) the court said: "It is argued by defendants that the court erred in finding that the damages to plaintiff are irreparable. The stipulations

agree that the plaintiff has been damaged by the conduct of defendants. There is no standard by which the amount of that damage can be measured with reasonable accuracy. Irreparable damage does not have reference to the amount of damage caused but rather to the difficulty, not to say impossibility, of measuring the amount of damages inflicted." See also in this connection *Lyons v Meyerson* — Misc —, 18 NYS(2d) 363 (1940) where the court, in a case involving a labor controversy said "The claim for damages despite the heroic attempt to establish the reality thereof, is disapproved and disregarded because no evidence of actual harm has been produced. While it is true that interference of the character complained of necessarily must have occasioned some harm and some unnecessary interference yet in the light of the facts and the conditions herein established, that harm and that interference would be far too chaotic in a materialistic sense to be admeasured in damages."

of legal remedy such as logically to open the door of chancery. According to the prevailing view the insolvency of the defendant is evidence of the irreparable nature of the injury,⁹⁷ or of the inadequacy of the legal remedy.⁹⁸ Modern labor unions, however, are not always insolvent. Agitation for the incorporation of labor unions and for laws supervising the use of union money for political purposes reflect public concern over the consequences of well filled union treasuries. Moreover, the money damage suits against labor unions, of which the Danbury Hatters case and the Coronado case are outstandingly illustrative, would seem to indicate that unions have often been held accountable civilly for wrongdoing. Again, labor unions are liable for treble damages under the Sherman Act, and the two cases mentioned in the preceding sentence are instances where labor unions were so sought (and in both cases successfully, the first through judgment, the second through settlement) to be held liable.⁹⁹ Finally, and perhaps most to the point, labor injunction cases are generally barren of any discussion with reference to the union's financial responsibility. If the finding of irreparable injury in labor injunction cases

97. *Crescent City Wharf Co. v Simpson*, 77 Cal 286, 19 P 426 (1888); *Ponder v Cox*, 28 Ga 305 (1859); *Carlson v Koerner*, 226 Ill 15, 80 NE 562 (1907); *Council Bluffs v. Stewart*, 51 Iowa 385, 1 NW 628 (1879); *Devou v. Pence*, 32 Ky L 697, 106 SW 874 (1908); *Eidemiller v. Guthrie*, 42 Neb 238, 60 NW 717 (1894); *Conley v. Chedic*, 6 Nev 222 (1870); *Kerlin v. West*, 4 NJ Eq 449 (1844); *Gause v. Perkins*, 56 NC 174 (1857); *Contra: Strang v. Richmond R. Co.* 93 F 71 (CC ED Va, 1899); *Simms v. Burnette*, 55 Fla 702, 46 S 90 (1906); *Bersch v. Rust*, 249 Pa 512, 95 A 108 (1915).

98. *Yarbrough v. Thornton*, 147 Ala 221, 42 S 402 (1906); *Chappell v. Boyd*, 56 Ga 578 (1876); *Deming v. James*, 72 Ill 78 (1874); *Denson v. Stuart*, 15 La Ann 456 (1847);

Drury v. Roberts, 2 Md Ch 157 (1848); *Jones v. Stanton*, 11 Mo 433 (1848); *Amoskeag Mfg. Co. v. Shirley*, 69 NH 269, 39 A 976 (1898); *Delafield v. Illinois*, 2 Hill 159, 26 Wend 192 (1841); *Phillips v. Trezevant*, 67 NC 370 (1872); *Chattanooga Grocery Co. v. Livingston (Tenn)* 59 SW 470 (1900); *Peterson v. Smith*, 30 Tex Civ App 139, 69 SW 542 (1902). *Contra: Dills v. Doebler*, 62 Conn 266, 26 A 398 (1892); *Godwin v. Phifer*, 51 Fla 441, 41 S 597 (1906); *Smith v. Howell*, 91 Or 279, 176 P 806 (1918).

99. See *supra*, sections 188, 198. *C/I Apex Hosiery Co. v. Leader*, 310 US 469, 60 S Ct 982, 84 L Ed 1311 (1940) limiting the application of the Sherman Act to interstate labor activities. See sections 417-419, *infra*.

is to be justified, such justification must be found in a basis other than that of the union's insolvency.

The second possible contention, i. e., the difficulty, if not the impossibility of measuring damages in relation to new businesses, has greater force, since damages are generally not recoverable in such cases because of the absence of past experience to provide a satisfactory measure. It is probably needless to say, however, that the great bulk of labor injunction cases involve not new but established businesses. In this connection the case of *Vander Platt v. Undertakers & Liverymen's Asso.*¹ may be profitably mentioned. There the plaintiff, desiring to engage in the embalming and undertaking business, applied for membership in an employers' association in the field, and attempted to purchase the equipment necessary to engage in the business. Upon refusal of the association to accept him into membership and of the sellers of the equipment to provide him with the equipment except at an exorbitant price, plaintiff sued to enjoin such acts as an illegal boycott. His suit was dismissed, however, because he could show no established business subjected to irreparable injury. Except in the simply and relatively infrequent case of a business subjected to unlawful labor activity from its inception, the union's financial responsibility and the possibility of measuring damages would seem, if the logic of the situation were to prevail, to preclude a showing of inadequacy of legal remedy, or of the existence of an irreparable injury.

That the logic of the situation does not prevail however, is evidenced by the number of injunctions issued against prosperous labor unions, at the instance of established businesses. The notion underlying in this connection, equity's assumption of jurisdiction, is that a business possesses a right, which equity will protect, to continue as a business and not to be transformed by illegal labor activity, into a mere right at law to collect damages. In *Jersey City Printing Co. v. Cassidy*,² the court stated this idea in the following language: "It will probably be found . . . that the

1. 70 NJ Eq 116, 62 A 453 (1905). S 851 (1909).
 Q/t Burt v. State, 169 Ala 134, 48 S. 63 NJ Eq 765, 53 A 230 (1902).

natural expectancy of employers in relation to the labor market, and the natural expectancy of merchants in respect to the merchandise market, must be recognized to the same extent by courts of law and courts of equity, and protected by substantially the same rules. It is freedom in the market, freedom in the purchase and sale of all things, including both goods and labor, that our modern law is endeavoring to insure to every dealer on either side of the market." ³ For this reason it has been stated above that the showing of irreparable injury is little more than a formal requirement. Given the existence of a business whose continuance is threatened by illegal labor activity, the showing of irreparable injury follows almost as a matter of law.

There is another reason many times if not usually asserted in labor cases as the ground for equitable intervention. The infliction of injury, it is said, is repetitious and continuous. An action at law will not suffice to provide an adequate remedy because not a single wrong but many repeated wrongs are involved, requiring the intervention of a court of equity. Equity is thus said to intrude for the purpose of preventing multiplicity of suits. The greater number of cases hold, and most of the cases assume, that repeated wrongs, such as trespasses⁴ or nuisances⁵ will prop-

3. *Emack v. Kane*, 34 F 47 (CC ND Ill 1888). *Iron Molders' Union v. Allis Chalmers Co* 166 F 45, 20 LRA(NS) 315 (CCA 7, 1908). *L. D. Willcutt & Sons Co. v. Driscoll* 200 Mass 110, 85 NE 897 (1908). *Vegeahn v. Guntner*, 167 Mass 92, 44 NE 1077, 35 LRA 722, 57 Am St Rep 443 (1896). *Cum berland Glass Mfg Co. v. Glass Bottle Blowers' Assn* 59 NJ Eq 49, 46 A 208 (1896). *Alfred W. Booth & Co. v. Burgess*, 72 NJ Eq 181, 65 A 226 (1906). *Atkins v. Fletcher*, 65 N1 Eq 658, 55 A 1074 (1904). *Johnston Harvester Co. v. Meinhardt*, 9 Abb NC 393, 60 How Pr 168 (NY 1880). *Eureka Foundry Co. v. Lecker*, 13 OS & CP Dec 398 (1902). *Badger Brass Mfg. Co. v. Daly*, 137 Wis 601, 119 NW 323 (1909). *Lyons v. Wil-*
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kins (1896) 1 Ch 811, 65 LJ Ch NS 601, 74 LTNS 358, 45 Week Rep 19, 60 NP 235. *Vulcan Iron Works v. Winnipeg Lodge*, 21 Manitoba LR 473 (1911).

4. *Donovan v. Pennsylvania Co.* 109 US 279, 26 S Ct 91, 50 L Ed 192 (1905). *Cullman Property Co. v. H. H. Hitt Lumber Co* 77 S 574 (Alabama 1917). *Illinois Central R. Co. v. Garrison*, 81 Miss 267, 32 S 906, 95 Am St Rep 469 (1902). *Golden v. New York City Health Department*, 21 AD 420, 47 NYS 623 (1897). *Wheeler v. St. Johnsbury*, 87 Vt 46, 87 A 349 (1913).

5. *Draberger v. University Heights Realty Co.* 126 Mo App 206, 102 SW 1060 (1907).

erly bring a complainant into equity simply because multiplicity of actions at law is thereby avoided. There are a number of cases, however, which cling closely to the technicality of the notions which guide equity's historically settled jurisdiction, and hold that it is necessary first to establish a right at law before equity may be petitioned for injunctive relief restraining further commission of the wrong.⁶

It has been held⁷ that a sit-down strike, called by a labor union in protest against the employer's decision to liquidate his business, is unenjoinable for the reason, among others, that the employer is unable to show the existence of an irreparable injury. Said the court: "I do not think that there was any competent evidence to establish the fact that irreparable injury to the plaintiff company has been committed. There was no evidence of any destruction of property or of anything other than an unlawful detainer which, it seems to me, is compensable in damages, and, therefore, does not indicate an irreparable injury such as would require the extraordinary remedy of an injunction" Since damages may, as has been seen, always be recovered by an established business against unlawful conduct which threatens the continuation of the business, it would seem at first thought that the court misconstrued the requirement that there must be a showing of irreparable injury as a condition to obtaining a labor injunction in the federal courts. The language of the court must be read, however, in connection with the facts of the case. The plaintiff, having closed its mill, and having instituted the action solely to restrain the defendants from interfering with the dismantling of the plant, was not petitioning equity for the right to continue business, and was hence relegated to the ordinary requirement of showing that an action at law for damages would not adequately compensate it for the alleged unlawful acts.

6. See *Holland v. Challen*, 110 U.S. 19, 3 S. Ct. 495, 28 L. Ed. 52 (1884). See also *Moses v. Mobile*, 52 Ala. 108 (1874); *Chicago Gen. R. Co. v. Chicago*, 181 Ill. 605, 54 NE 1026 (1900).

Gray v. Coan, 36 Iowa 206 (1873); *Wallack v. N. Y. Soc. for Reformation*, 67 NY 23 (1876).

7. *Oswald v. Leader*, 20 F. Supp. 876 (DC ED Pa. 1937).

The Norris Act uses the term "property" only as the subject matter which must be subjected to irreparable injury as a condition to the securing of a labor injunction, while the Clayton Act uses the words "property or property right" in like connection. Was it the intention of Congress, in connection with the Norris Act, to limit the labor injunction so as to preclude its issuance except in cases involving irreparable injury to tangible property only, and to place a business or a "property right" completely beyond the pale of injunctive relief? Agitation designed to effect such a result was prevalent prior to the enactment of the Norris law.⁸ The courts have placed such a construction upon the word "property" as used in the Norris Act, however, as to include a business or "property right" within its meaning. The word "property" in the Norris Act and the words "property and property right" in the Clayton Act have consequently been held to mean one and the same thing.⁹ Nor is this an unwarranted interpretation, for in *Truax v. Corrigan*,¹⁰ the Supreme Court of the United States had plainly held that

8. See Frey, *The Labor Injunction*, pp. 33-34 where such a view is contended for. See also, for a criticism of this view, Frankfurter & Green, *The Labor Injunction* (1930) and see, for a statement of the manner in which equity assumed jurisdiction to grant injunctive relief on behalf of business, *supra*, section 30.

9. *Triplex Shoe Co. v. Cantor*, 25 F Supp 996 (DC ED Pa 1939); in *Knapp-Monarch Co. v. Anderson*, 7 F Supp 332 (DC ED Ill 1934) the court clarified the point as follows: "The contention of counsel for the defendants that the evidence fails to show that substantial and irreparable injury to plaintiff's property has occurred or will follow is, in my judgment, based on an entirely too narrow view of the meaning of the term 'property' as used in the Act under consideration. It is true that the term 'property right' as used in

connection with the term 'property' in the Clayton Act was dropped by Congress when the Norris Act was enacted. From this it does not follow that, before a court can find that 'substantial and irreparable injury to complainant's property will follow,' there must be evidence of threatened direct violent injury to or destruction of the physical property of the complainant. The term, 'property right' as used in the Clayton Act may have broadened or left less restricted the jurisdiction of the court to afford relief in cases of injuries to rights in the nature of property that were beyond the commonly understood meaning of property . . . but, in my opinion, it did not have the effect of narrowing the commonly accepted meaning of property."

10. 257 US 312, 42 S Ct 124, 66 L Ed 254, 27 ALR 376 (1921).

[† Teller]

the right to ~~conduct~~ a lawful business and thereby acquire pecuniary profits is property.

Tangible property, on the other hand, has received somewhat inferior consideration than has a "property right" or a going business. It has been held, as heretofore stated, that one who liquidates his business and thereafter sues to enjoin a sit-down strike bears the burden of showing that damages will not compensate him for the unlawfulness, since mere property is thus being detained, as distinguished from interference with a going business.¹¹

Section 218. Effect of Denying Relief.

The provision of the statute which must be satisfied in this connection is contained in section 7(c), whose words are as follows: "that as to each item of relief granted greater injury will be inflicted upon complainant by the denial of relief than will be inflicted upon defendants by the granting of relief."

The instant requirement is but a differently worded statement of the well established principle that equity will balance inconvenience with injury before issuing the drastic remedy of injunction.¹² Alleged widespread disregard or at least forgetfulness of this requirement in most labor cases prompted inclusion of this requirement in the Act.¹³ It has been held that a specific finding must be made, as a condition to the issuance of an injunction, that as to each item of relief granted, greater injury will be inflicted upon the complainant by denial of injunctive relief than by the granting of relief.¹⁴ In *Murphy v. Ralph*,¹⁵ a labor union sued to restrain employers from breaching a collective bargaining agreement. The defendants asserted, among other things, that greater harm would result to them from the

11. *Oswald v. Leader*, 20 F Supp 876 (DC ED Pa 1937). See *supra*, section 210.

12. *Herr v. Central Kentucky Lunatic Asylum*, 110 Ky 282, 61 SW 238 (1901); *Troy R. Co. v. Boston*, 66 NY 107 (1881); *Thompson v. Andrews*, 39 ED 477, 165 NW 9 (1917).

13. The instant requirement is not to be found in the Clayton Act. See 38 Stat. 730, sec. 20, 29 USCA sec. 52.

14. *Lauf v. Shinner*, 303 US 323, 58 S Ct 578, 82 L Ed 872 (1938).

15. 165 Misc 335, 299 NYS 270 (1937).

granting of the injunction than would result to the plaintiffs from its denial. The court, however, held to the contrary saying: "The only harm, if harm it may be called, that will come to the defendants, is that they will be compelled to abide by the terms of an agreement which they voluntarily executed. To the plaintiffs a denial of relief sought will mean that its efforts, not only on behalf of its own members, but in its striving to establish a relationship which will benefit all workers in the field of occupation, will have received a setback, not easily regained."

Section 219. Lack of Adequate Remedy at Law.

In addition to the foregoing requirements which the complainant must satisfy in order to obtain injunctive relief under the act, the complainant must show, according to subsection (d) of Section 7, that he "has no adequate remedy at law." The instant requirement, which is likewise contained in the Clayton Act,¹⁶ is as old as the mandate of injunction itself. Because the English Chancellor, while disrespecting the ability of the pigeon-holed writ-ridden common law to do substantial justice, had to contend with common law judges jealous of their jurisdiction, we have inherited a system of law wherein specific relief is conceived as an extraordinary instead of an ordinary remedy. The Civil Law, having passed through no such historical difficulty, holds to the contrary. An adequate remedy at law has been defined as one "that affords relief with reference to the matter in controversy, and which is appropriate to the particular circumstances of the case."¹⁷ It is well settled that the existence of a remedy at law does not necessarily preclude injunctive relief.¹⁸ In order to have that effect, a remedy at law must, in the first place, be plain and not doubtful or obscure.¹⁹ Secondly, it must be complete.²⁰

16. 38 Stat. 730, section 20, 29 US CA section 52.

17. *Mt Vernon v. Berman*, 100 Ohio St 1, 75, 125 NE 116 (1919).

18. *In re Debn*, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1895); *Wine-
tine v. Rose Cloak Co.* 93 Conn 633,

107 A 500 (1919).

19. *Franklin Tel Co. v. Harrison*, 145 US 459, 12 S Ct 900, 36 L Ed 776 (1902); *Kaufman v. Stein*, 138 Ind 49, 46 Am St Rep 368 (1893).

20. *Potson v Chicago*, 304 Ill 222, 136 NE 594 (1922).

The failure by the court below to make a finding of fact that the complainant's remedy at law was inadequate was held on appeal to be fatal to the jurisdiction of the court below to issue an injunction in a case involving a "labor dispute."²¹ It has been held that one who closes down his business in consequence of labor difficulties may not thereafter successfully sue to enjoin a sit-down strike called by the plaintiff's former employees for the purpose of preventing removal of the machinery and liquidation of the plant, because an action of ejectment will furnish an adequate legal remedy.²²

Section 220. Failure or Refusal of Public Authorities to Protect the Complainant.

The requirement of subsection (e) of Section 7 of the act which the complainant must satisfy by showing facts to such effect to the court is "that the public officers charged with the duty to protect complainant's property are unable to or unwilling to furnish adequate protection" This requirement together with that, hereafter to be considered, which obligates the complainant to attempt a settlement of the controversy, are the most radical innovations of anti-injunction legislation. Neither is found in the Clayton Act. The obvious purpose of the instant requirement is to reinstate the primary responsibility for keeping the peace upon public officers, whose sworn duty it is to keep the peace. The Norris Act has codified the contention advanced by labor for many years, that the remedying of wrongdoing committed in the course of industrial disputes is an executive and not a judicial function.²³ In the famous

²¹ *Fur Workers Union v Fur Workers Union*, 70 App DC 122, 105 F(2d) 1 (CA DC 1939)

²² *Oswald v Leader*, 20 F Supp 876 (DC ED Pa 1937)

²³ "In practice dangers to the public peace arising from picketing activities can be adequately controlled by an effective police administration." (Note) 48 Yale LJ 314 (1938). See also, *Lipoff v United*

Food Workers Industrial Union, 33 Pa D & C 599, 613 (1934) where the court, in connection with the Pennsylvania anti injunction act (prototype of the Norris Act) said "... the most effective sanction against breaches of the peace such as those here alleged is the police power. It is the duty of the police of the city to prevent them and to end them when they are in progress. This is

case of *In re Debs*²⁴ the court purported to answer Debs's contention in this respect as follows: "The right (of the government) to use force does not exclude the right of appeal to the courts for a judicial determination and for the exercise of all their powers of prevention. Indeed, it is more to the praise than to the blame of the government, that, instead of determining for itself questions of right and wrong on the part of these petitioners and their associates and enforcing that determination by the club of the policeman and the bayonet of the soldier, it submitted all those questions to the peaceful determination of judicial tribunals and invoked their consideration and judgment as to the measure of its right and powers and the correlative obligations of those against whom it made complaint." This however, says labor, is not the way in which it has worked out. Eugene V. Debs, testifying before the United States Strike Commission in 1895,²⁵ insisted that it was the court injunction, and not anything done by the executive branch of the government, which broke the Pullman strike.²⁶

Even anti-injunction legislation which preceded the Nor-

much more effective for immediate relief against violence than injunctions can be."

24. 158 US 565, 15 S Ct 900, 39 L Ed 1093 (1895).

25. Report on the Chicago Strike (1895), 143-144.

26. "That injunction was served simultaneously, or practically so, by all of the courts embracing or having jurisdiction in the territory in which the trouble existed. From Michigan to California there seemed to be concerted action on the part of the courts restraining us from exercising any of the functions of our offices. That resulted practically in the demoralization of our ranks. Not only this, but we were organized in a way that this was the center, of course, of operations . . . as soon as the employees found that we were arrested and taken from the scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike; it was not the brotherhoods that ended the strike; it was simply the United States courts that ended the strike. . . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken and the strike was broken up by the Federal courts of the United States, and not by the Army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of the employees." Testimony of Eugene v. Debs, United States Strike Commission, Report on the Chicago Strike, 143-144 (1895).

scene of action, they became demoralized, and that ended the strike. It was not the soldiers that ended the strike; it was not the brotherhoods that ended the strike; it was simply the United States courts that ended the strike. . . . Our headquarters were temporarily demoralized and abandoned, and we could not answer any messages. The men went back to work, and the ranks were broken and the strike was broken up by the Federal courts of the United States, and not by the Army, and not by any other power, but simply and solely by the action of the United States courts in restraining us from discharging our duties as officers and representatives of the employees." Testimony of Eugene v. Debs, United States Strike Commission, Report on the Chicago Strike, 143-144 (1895).

ris Act was prompted by the tacit assumption that the police and the machinery of the criminal law instead of the injunction ought more properly to be the intruding governmental factor. The Arizona anti-injunction statute of 1913²⁷ was accordingly construed by the Arizona high court in the case of *Truax v. Corrigan*²⁸ to place mass picketing beyond the pale of injunctive relief even though the picketing was coupled with libellous and abusive language, where it was unconnected with actual violence. Upon appeal to the United States Supreme Court, however, the statute was declared unconstitutional.²⁹ Here was a holding by the highest court in the land which in effect said: We disagree with the Arizona legislature. We take the view that the criminal law and the arm of the executive in the form of police protection is insufficient protection of the right to a free and open market which we sometimes call the right to do business. This substantive right must be protected by the most effective procedural remedy, i. e., the labor injunction. This, in effect, was the holding by the United States Supreme Court in *Truax v. Corrigan*. The Norris Act, to be sure, needed not to contend with this constitutional objection, because the source of the power to pass that act was found, as has been seen³⁰ in Congressional power over the jurisdiction of inferior federal courts. But state statutes patterned upon the Norris Act, being limited by the due process phrase of the 14th amendment to the federal constitution, had to be canny if their constitutionality were to be upheld.

With this background in mind, it will be seen that state anti-injunction legislation of the Norris Act kind reflect a most careful legislative ability. Police protection is insufficient as a sole remedy to protect the substantive right to do business, said the court in *Truax v. Corrigan* (supra). So modern anti-injunction legislation does not take away the power to issue labor injunctions, but limits their issu-

27. 1913 Rev. Stats sec 1464;
1928 Rev Code (Struckmeyer), sec.
4284.

28. 257 US 312, 42 S Ct 124, 66
L Ed 254, 27 ALR 375 (1921).

29. See sections 204-207, supra.

30. 20 Ariz 7, 176 P 570 (1918).

ance to cases where police protection is inadequate. The Supreme court in the *Truax* case (supra) had said that police protection may be inadequate and hence, because the labor injunction had been completely abolished, the statute which sought to effect its abolition was unconstitutional. Modern anti-injunction legislation accordingly says, in rhythm with the holding of the Supreme Court in the *Truax* case (supra) that injunctive relief must be withheld until it be found that police protection is inadequate.

The first thought induced by a reading of this requirement is that injunctions are no longer obtainable in cases involving "labor disputes," for it would be an insult to our public authorities charged with keeping the peace to say that they have, in any given case, been derelict in the performance of their duties. Nevertheless, as we shall see directly, injunctions in goodly number have been granted in cases where the instant finding is required to be made. That such injunctions have issued is reflective of several circumstances: first, that courts have not taken this requirement for its face value, and have been content with insufficient proof to lay a proper foundation for this finding. Second, that tactics employed in labor disputes cases are sometimes elusive enough to prevent subjection of the wrongdoers to immediate arrest. Third, that injunctions have peculiar value more efficacious than the guaranties which public law enforcing agencies afford; fourth, that the police have not been able or disposed in many labor cases to determine adequately the borderline between peaceful and non-peaceful activities.

It is everywhere held that a failure to allege and prove the instant requirement precludes the issuance of an injunction in a "labor dispute" case.²¹ The authorities are in

81. *Lauf v. Shinner*, 303 U.S. 323, 58 S. Ct. 578, 82 L. Ed. 872 (1938); *Heintz Mfg. Co. v. Local Union*, 20 F. Supp. 116 (DC ED Pa. 1937); *Diamond Full Fashioned Hosiery Co. v. Leader*, 20 F. Supp. 467 (DC ED Pa. 1937), appeal dismissed in 90 F(2d) 1001 (CCA 3, 1937); *Oswald v. Lead-*

er, 20 F. Supp. 876 (DC ED Pa. 1937); *Grace Co. v. Williams*, 20 F. Supp. 263 (DC WD Mo. WD 1937) aff'd 96 F(2d) 478 (CCA 8, 1938); *Cupples v. American Federation of Labor*, 20 F. Supp. 804 (DC ED Mo. ED 1937); *Int'l Brotherhood of Teamsters v. International Union*, 106 F(2d) 871

conflict, however, as to the precise meaning of "public officers" as used in the Act. In *Laclede Steel Company v. Newton*,³³ it was held that the governor was not thereby meant to be included, so that the notice of hearing required by the statute did not need to be served upon him, but only upon the public officers of the city or county where the unlawful acts are alleged to have taken place. In *Micamold Radio Corporation v. Beedie*,³⁴ upon the other hand, it was concluded that "This clause is not by its terms confined to public officials, but extends to higher executives and to require the finding that all of those had failed lifts the fact from "a more 'conventional assertion' to an essential to retention of jurisdiction and would seem to require proof that all possible public officers had failed, right up to the need of calling out the troops, and might be the equivalent of saying that no injunction shall issue until martial law has been invoked." In *Cole v. Atlanta Terminal Co.*,³⁴ which involved a suit by one group of clerical workers of a terminal company subject to the Railway Labor Act to enjoin another group from using a bargaining certificate issued to it by the Mediation Board, it was held that the members of the Mediation Board "are public officers whose duty it is to protect these complainants in their quasi property right

(CCA 9, 1939) *Coryell v. Petroleum Workers Union*, 19 F Supp 749 (DCD Minn Third Division 1936), *People ex rel Sandness v. Kings County*, 164 Misc 365, 299 NYS 9 (1937), *Hulstizer v. Kline*, 18 Loh LJ 119 (Pa 1939), *C/f Murphy v. Ralph*, 165 Misc 335, 290 NYS 270 (1937) where a union sued to enjoin further breach of a collective bargaining agreement. The court's language is to the effect that the instant requirement is inapplicable to such a case (although the court assumed the case to involve a "labor dispute") or that the requirement was met: "Of course it has not been necessary to call upon any public officers to protect the plaintiffs' property. But that is hardly a

ground for denying the relief sought. Civil Practice Act section 876-a required a finding that the public officers 'have failed or are unable to furnish adequate protection.' The instant situation, where plaintiffs are peacefully and pursuant to their legal prerogative attempting to prevent a violation of their contractual rights by appeal to the judiciary, is one where the public officers 'are unable' to furnish adequate protection."

32. 6 F Supp 625 (DC SD Ill SD 1934) aff'd 80 F(2d) 636 (CCA 7, 1935).

33. 156 Misc 390, 282 NYS 77 (1935).

34. 15 F Supp 131 (DC ND Ga Atlanta Division 1936).

to contract by representatives who really represent them." Since there was no showing of unwillingness on the part of the Mediation Board to act, the bill was dismissed. In general, however, the cases hold that the term "public officials" means state, county or city law enforcing officers.³⁵ This would appear to be the correct view, since the notice of application for an injunction required by section 7 of the Act is directed only toward "the chief of those public officials of the county and city" where the unlawful acts are alleged to have been threatened or committed.

It has been held that an injunction will be denied where the public officers charged with the duty of keeping the peace and protecting property have failed to do so not because of inability or unwillingness, but because of a misconception of the law governing the situation. In *Knapp-Monarch Company v. Anderson*,³⁶ the Chief of Police testified that his version of the legality of mass picketing was that such picketing was entirely lawful, except where resulting in "riots, traffic jams, fighting, assaults and other like violent conduct." The court thereupon instructed the Chief of Police that mass picketing inevitably results in violence, intimidation or both, and is consequently illegal per se and subject to the duty of the police to deal with summarily by arrest. Hence, reasoned the court, there being no evidence of inability or unwillingness on the part of the public officers charged with keeping the peace to deal with unlawfulness and to perform their duties, an injunction should not issue. To the contrary is *Busch Jewelry Co. Inc. v. United Retail Employees*.³⁷ There the court stated that it was brought out in the case that the Police Department leaves to the discretion of each individual precinct captain the right to determine in what general form picketing is privileged. "Thus the number of pickets, the manner of picketing itself and the character of the whole program to ad-

35. See *Lake Valley Farm Products v. Milk Wagon Drivers Union*, 108 F(2d) 436 (CCA 7, 1939); *Cupples Co. v. American Federation of Labor*, 20 F Supp 804 (DC ED Mo 1934).

ED 1937).

36. 7 F Supp 332 (DC ED Ill 1934).

37. 108 Misc 224, 5 NYS(2d) 575 (1938).

wise the ~~proper~~ nature and extent of the strike is reposed within the sound discretion of a police officer." The court described the illegal character of the picketing and stated that "there is no doubt that the police officers have acquiesced, unintentionally, no doubt, in a course of conduct, illegal, anti-social and fundamentally-opposed to the preservation of these plaintiff's rights." The fact that the police protection afforded was insufficient because of a mistaken exercise of discretion rather than unwillingness or inability mattered not, and the plaintiff's application for an injunction was granted.

In several cases the courts have had occasion to examine the evidence for the purpose of determining whether police protection was adequate or inadequate. In *Cupples Co. v. American Federation of Labor*,³⁸ it was held that the complainant had failed to meet the present requirement, the court saying: "It appears from the evidence that the police department, when called upon to patrol the plaintiff's property or to furnish escorts for any of plaintiff's employees, responded promptly and efficiently." A contrary decision is *Lake Charles Stevedores v. Mayo*,³⁹ which involved a particularly violent controversy. The sheriff placed two deputies upon the scene of disorder, one of whom had three sons in the picket line. The governor refused to send in state police or units of the National Guard. Thereupon the local dock board employed a detective agency who sent in 50 heavily armed guards. This in turn caused the union to renew its mass picketing with greater energy and ere long a veritable war was precipitated, with the result that men were killed and wounded. The governor closed the port for six days and at the expiration of that time announced that he would "wash his hands" of the matter. "Both the sheriff and the governor, as well as their adherents, were in the midst of a campaign for the general state election of officers," the Court observed, "and there appears little doubt but that this fact accounts for the failure or refusal of these

³⁸ 20 F Supp 894 (DC ED Mo ED 1937).

³⁹ 20 F Supp 698 (DC WD La Lake Charles Division 1935).

officials to do their duty." The court concluded that the complainants had amply satisfied the present requirement. In *Cinderella Theater Co. v. Sign Writers' Local Union*,⁴⁰ it was held that the discharging of two stench bombs in one of the plaintiff's theaters more than a year prior to the time of application for an injunction, though there was no recurrence of such activity thereafter, is sufficient to indicate inability by the police to furnish adequate protection where it further appeared that the plaintiff's advertising posters and signs in front of their theaters were repeatedly (and usually at night) defaced and mutilated by unknown persons who replaced pasters on the signs reading "unfair to organized labor." But in *United States Elec. Mfg. Co. v. Frykberg*,⁴¹ isolated instances of violence were held insufficient to indicate that the police were unable to deal with the controversy.

The circulation of false and misleading statements when coupled with the use of stench bombs, vandalism and the collection of crowds, by street meetings at the complainant's premises were held in *De Agostina v. Holmden*⁴² to justify a finding of dereliction by the police. However, in *Heintz Mfg. Co. v. Local Union*,⁴³ the maintaining of a picket line which at times reached the numbers of 250 to 300 men was held insufficient to show inability or unwillingness on the part of public officials to protect the complainant's property though the Mayor had refused to drive away all but a handful of pickets, where it also appeared that no violence had taken place, that the picketing was peaceful except for occasional insults and opprobrious epithets and a single case of jostling, and that the city continuously maintained a police force varying in number from 15 to 60, which were in complete control of the situation. *Grandview Dairy, Inc. v. O'Leary*⁴⁴ is a case where police protection was held inadequate. Said the court: "The tes-

40. 6 F Supp 164 (DC ED Mich SD 1934).

41. 93 NYLJ 2852 (1935).

42. 157 Misc 819, 285 NYS 900 (1935).

43. 93

43. 20 F Supp 116 (DC ED Pa 1937).

44. 158 Misc 791, 285 NYS 841

(1936).

timony shows that the plaintiff served thousands of customers, mostly small storekeepers, whose places of business are widely scattered over the area of the entire city. The method of the defendant is to employ flying squadrons which trail different trucks of the plaintiff manned by agents who stop only briefly at the stores of the customers, make visits of intimidation and threat, and then depart for the stores of other customers in localities unknown. Manifestly, it is impossible for the police authorities to give adequate protection against such picketing unless they are to be expected to detail officers on continual guard at every establishment. The proof shows that plaintiff appealed for police protection and was promised full cooperation and that, apparently, a sincere effort was made by the municipal police authorities to give such protection. But it proved unavailing, for the acts of visitation and intimidation continued."

Section 221. Efforts at Settlement.

Section 8 of the Act, setting forth the requirements which, in addition to the others hereinbefore set forth, must be satisfied as conditions to the obtaining of injunctive relief under the Act, provides as follows: "No restraining order or injunctive relief shall be granted to any complainant who has failed to comply with any obligation imposed by law which is involved in the labor dispute in question, or who has failed to make every reasonable effort to settle such dispute either by negotiation or with the aid of any available governmental machinery of mediation or voluntary arbitration."⁴⁵

45. At common law, refusal by an employer to submit differences to arbitration does not operate to bar equitable relief against illegal labor activity. *Thomson Mach Co v Brown*, 89 NJ Eq 326, 108 A 120 (1918); *Berg Auto Trunk & Specialty Co. v Wiener*, 121 Misc 796, 200 NYS 745 (1923). In the latter case, the court said that any other rule would have the effect of com-

PELLING, by judicial decision, resort to arbitration. In *Vaughan v. Kansas City Moving Picture Operators' Union*, 35 F(2d) 78 (DC WD Mo 1929), where a blanket injunction was entered because of the violence in connection with past exercise of the labor activity, the court indicated that the injunction was entered partly because the union had refused to meet with the employer in connec-

It is generally held that failure by a complainant to allege the making of every reasonable effort to settle a "labor dispute," either by negotiation or with the aid of governmental machinery of mediation or voluntary arbitration, precludes the issuance of an injunction.⁴⁴ In *Bulkin v. Sacks*,⁴⁵ the court accordingly held that "since the suit was brought prematurely plaintiffs cannot help their position by attempting to amend the bill by showing that the prerequisites of bringing suit were complied with after its commencement." It has been held that mere perfunctory efforts will not lay the foundation for the satisfaction of this requirement.⁴⁶ In one case, however, it was held⁴⁷ that "the statute only requires that attempts at settlement be made prior to the issuance of the injunction; it does not require the offer to be made prior to the institution of the action." In another, the court, stating that "an unlawful act can hardly be the subject of mediation or arbitration" held⁴⁸ that, though the controversy was apparently a "labor dispute," no allegation or proof of attempted settlement needed to be made.

An exceedingly doubtful reading of the instant provision of the New York anti-injunction act is that contained in *May's Furs and Ready-To-Wear, Inc. v. Bauer*,⁴⁹ where, though picketing in the absence of a strike was held to con-

tion with one of the issues involved in the dispute.

See, for statutes dealing with the arbitration of labor disputes, *infra*, sections 457, 458. Arbitration generally is discussed *supra*, at chapter eleven, sections 176-185.

44. *L. L. Coryell & Son v. Petroleum Workers Union*, 19 F Supp 749 (DCD Mo Third Division 1936); *Oswald v. Lender*, 20 F Supp 876 (DC ED Pa 1937); *People ex rel. Sandness v. Kings County*, 164 Misc 355, 299 NYS 9 (1937); *Bulkin v. Sacks*, 31 Pa D & C 501 (1938); *Hulseizer v. Kline*, 18 Leh LJ (Pa) 119 (1939); *Tobin v. Shapiro*, 32 Pa D & C 291 (1938). A general allegation to the effect that the petitioners have done

everything in their power to effect a voluntary and friendly adjustment of the controversy, without facts pleaded in support of such allegation, is insufficient. *Stanley v. Peabody Coal Co.* 5 F Supp 612 (DC SD Ill 1934).

47. 31 Pa D & C 501 (1938).

48. *Oriando Mills, Inc. v. Levenson*, NYLJ June 14, 1936 (NY Supreme Court, NY County).

49. *Murphy v. Ralph*, 165 Misc 335, 299 NYS 270 (1937).

50. *Wisconsin State Federation of Labor v. Simplex Shoe Mfg. Co.* 215 Wis 423, 256 NW 56 (1934).

51. 232 NY 331, 26 NE(2d) 379 (1940), reargument denied 232 NY 804, 27 NE(2d) 210 (1940).

stitute a "labor dispute" under the New York Anti-Injunction Act, the court held further that under such circumstances no allegation needs to be made nor proof adduced that the employer offered to settle the controversy. Said the court: "In the absence of evidence of a contrary intent, a reasonable construction of the statute does not require the allegation and proof that plaintiff employer offered to negotiate with defendant union in a situation such as that disclosed by the findings in the case at bar. It has been found that this defendant union does not include among its members any employees of the plaintiff employer and that every employee of the plaintiff employer is opposed to being represented by the union. Under these circumstances, negotiation would be an idle and futile ceremony and need not be alleged and proved as a prerequisite to injunctive relief."⁵³ This is outright disregard of the express words of the statute. Having found that the controversy is a "labor dispute," the provision relating to reasonable effort to settle the controversy applies. The provision, indeed, applies only in such a case. It might also be noted that the New York Court of Appeals has long upheld the legality of picketing in the absence of a strike upon the theory that "The labor organization may be as interested in the wages of those not members or in the conditions under which they work, as in its own members, because of the influence of one upon the other. All engaged in a trade are affected by the prevailing rate of wages. All by the principle of collective bargaining. Economic organization today is not based on the single shop."⁵⁴ The notion that "the right to strike and maintain pickets against the employer is deemed the right of his employees only"⁵⁵ which underlies the rule in those jurisdictions holding picketing illegal in the absence of a strike,⁵⁶ is not that which has de-

52. Accord: *Donnelly Garment Company v. I.L.G.W.U.* 99 F(2d) 300 (CCA 8, 1938), cert den. 305 US 662, 59 S Ct 364, 83 L Ed 430 (1939); *Cater Construction Company, Inc. v. Nischwitz*, 111 F(2d) 971 (CCA 7, 1940).

53. *Exchange Bakery v. Rifkin*, 245 NY 260, 157 NE 130 (1927), reargument denied 245 NY 651, 157 NE 895 (1927).

54. *Simon v. Schwachman*, 18 NE (2d) 1 (Mass 1938).

55. See *supra*, section 117, for a

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terminated the life of the New York law. The result is that picketing in the absence of a strike, which was a recognized right in New York prior to the enactment of the anti-injunction law, equal to any other picketing right, is now a right subjected to a disability to which picketing in connection with a strike is not subjected.

It will be noted that the language of the requirement presently considered does not seem at any time to obligate one to utilize governmental machinery of mediation or voluntary arbitration. The words of the statute, that is to say, are in the disjunctive, requiring direct negotiation *or* the utilization of governmental machinery. In *Cole v. Atlanta Terminal Co.*,⁵⁶ however, the court held that, in a controversy between two groups of clerical workers of a terminal company subject to the Railway Labor Act, the plaintiff was obligated to employ the services of the Mediation Board constituted under that Act for the purpose of certifying approximate bargaining agents and otherwise effecting the settlement of labor disputes. In clear violation of the language of the statute is the holding of the court in *Bulkin v. Sacks*⁵⁷ which was an action by a labor union against an employer to restrain further violation of a collective bargaining agreement. Although it appeared that the plaintiff had, before commencement of the action, sought compliance with the terms of the agreement, an injunction was denied solely because the plaintiff had failed to avail itself of the arbitration facilities afforded under the State Mediation Act. "Or," reads the statute. "And," says the Pennsylvania court.

The courts have passed on numerous factual patterns wherein the sufficiency of an allegation or proof in support thereof, that every reasonable effort was made to settle the dispute, was questioned by the party against whom the injunction was sought. In *Grandview Dairy v. Leary*,⁵⁸ the

list of those jurisdictions which hold picketing illegal, if carried on in the absence of a strike.

56. 15 F Supp 131 (DC ND Ga Atlanta Division 1936).

57. 31 Pa D & C 501 (1938). See also *Tobin v. Shapiro*, 32 Pa D & C 291 (1938).

58. 158 Misc 791, 235 NYS 841 (1936).

facts were that at the expiration of the agreement between the plaintiff employer and the defendant union a discussion was had in connection with the renewal thereof at which discussion the plaintiff stated "that its employees were unwilling to have it renewed unless they received through the defendant the same advantages which they would receive through their own organization," which the defendant refused. The employees, it appeared, threatened to strike if the agreement were otherwise renewed. The court held this sufficient effort to negotiate a settlement as against the defendant's contention that further parleys were necessary.⁵⁹ In *De Agostina v. Holmden*,⁶⁰ which involved a suit by one labor union against another in a jurisdictional dispute, the evidence, which the court considered sufficient, failed to disclose any attempt by the plaintiff himself to negotiate a settlement of the controversy. Reliance was placed by the court upon the fact that the Independent Theatre Owner's Association had, with the plaintiff's knowledge, sought to effect a settlement of the controversy, and the further fact that the plaintiff, Allied Motion Picture Operators Union, had theretofore attempted to ameliorate the internal conditions of the defendant, Local 306 of the Moving Picture Machine Operators Union. In *Mayo v. Dean*,⁶¹ the plaintiff was held to have satisfied the instant requirement by availing himself of the services of a mediator of the Department of Labor, while in *Newton v. La Clade Steel Co.*⁶² a like holding was based upon evidence that the plaintiff's president negotiated with the State Labor Board after a complaint had been filed with the Board by some of the plaintiff's workers.

Cases involving competing unions have been troublesome to the courts in relation to the present requirement. Faced with the broad definition of the words "labor dispute" in the Norris Act, federal courts have generally, as has been

⁵⁹. See also *Busch Jewelry Co. v. United Retail Employees Union*, 108 Misc 224, 5 NYS(2d) 575 (1938); *F. Everett v. Penna.*, 168 Misc 589, 6 NYS(2d) 630 (1938).

⁶⁰. 157 Misc 819, 285 NYS 909 (1935).

⁶¹. 82 F(2d) 554 (CCA 5, 1936).

⁶². 80 F(2d) 636 (CCA 7, 1935).

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seen," held picketing by one union seeking to dislodge another union to constitute a "labor dispute" and hence to put the complainant to the onus of alleging and proving the requirements which, under the Norris Act, condition the issuance of an injunction. Here a difficulty develops, for the employer is thereby required to allege and prove that which is an unfair labor practice under the National Labor Relations Act, namely, that he has bargained with a view toward effecting a settlement with a union representing less than a majority of his employees. Faced with this situation, some courts have held that in such a case the instant requirement may be dispensed with since, as was said in one of the cases, "it clearly appears from the facts pleaded that any effort on their part to settle the dispute would have violated the duty which they owed to their employees under the terms of the National Labor Relations Act and under their contract with their employees and would have been useless and unreasonable."⁶³ In *Grace Co. v. Williams*,⁶⁴ where the holding was to the same effect, the court indicated the reasoning behind its decision as follows: "The Norris-La Guardia Act is general in its character, and was passed prior to the enactment of the Wagner Act or the Railway Labor Act."⁶⁵ At the time of its enactment, the obligations imposed upon the employer with respect to dealing with the duly constituted representatives of the employees alone and as a unit had not been imposed. The later establishment of these obligations by the latter act operated to create an exception to the general provision of the Norris-La Guardia Act, with the result that employers, by reason of the recently established obligation to deal with one entity and one alone were necessarily not required to deal or negotiate with any other."

⁶³ See *supra*, section 211

⁶⁴ See *Donnelly Garment Co. v. Int'l Ladies Garment W. Union*, 99 F(2d) 309 (CCA 3, 1938), cert. den. 305 US 662, 59 S Ct 364, 82 L Ed 430 (1939).

⁶⁵ 20 F Supp 263 (DC WD Mo WD 1937) *aff'd* 96 F(2d) 478 (CCA 8, 1938).

⁶⁶ In *Virginian Rwy. Co. v. System Federation*, 300 US 515, 57 S Ct 592, 81 L Ed 789 (1937), the Supreme Court held the earlier enacted Norris Act in 1932 to have been superseded by the later enacted Railway Labor Act as amended in 1934 to the extent of conflict between the two Acts.

Section 222. Limitations upon Ex Parte Orders.

As has been seen from the provisions of section 7(e) of the act, ex parte orders in restraint of labor activity may issue where the complainant alleges that "unless a temporary restraining order shall be issued without notice, a substantial and irreparable injury to complainant's property will be unavoidable." It is also provided by section 7(e) that the ex parte order may be issued only upon testimony under oath which, if sustained, would be sufficient to justify the court in issuing a temporary injunction upon a hearing after notice. It is further provided that a temporary restraining order "shall be effective for no longer than five days and shall become void at the expiration of said five days," and that neither a temporary restraining order nor a temporary injunction shall be issued unless the complainant first file a suitable undertaking to recompense the defendant for any loss, expense or damage (together with a reasonable attorney's fee) should the complainant ultimately prove unsuccessful in establishing his case.

Section 223. Undertaking Required by the Act.

The undertaking required by the act as a condition to the issuance both of a temporary restraining order and a temporary injunction must be sufficient, as sketched in the preceding section and more fully to be stated in this section, to recompense those enjoined for any loss, expense or damage caused by the improvident or erroneous issuance of such order or injunction, including all reasonable costs (together with a reasonable attorney's fee) and expense of defense against the order or against the granting of any injunctive relief sought in the same proceeding and subsequently denied by the court. It is further provided by section 7(e) that a defendant aggrieved by an improvident issuance of a temporary restraining order or injunction may have his election to proceed either to have his damages assessed in the same proceeding or to pursue his ordinary remedy by suit at law or in equity upon the undertaking. Should the aggrieved defendant determine upon a hearing within the injunction proceeding to determine his loss and damage,

then it is provided that both the complainant and the surety submit themselves to the jurisdiction of the court for that purpose by the filing of the undertaking. The language of the applicable provisions of section 7 is as follows: "The undertaking herein mentioned shall be understood to signify an agreement entered into by the complainant and the surety upon which a decree may be rendered in the same suit or proceeding against said complainant and surety, upon a hearing to assess damages of which hearing complainant and surety shall have reasonable notice, the said complainant and surety submitting themselves to the jurisdiction of the court for that purpose. But nothing herein contained shall deprive any party having a claim or cause of action under or upon such undertaking from electing to pursue his ordinary remedy by suit at law or in equity."

In *Cinderella Theatre Co. v. Sign Writers Local Union*,⁶⁷ it appeared that a temporary injunction issued before a hearing was lifted by a dismissal of the bill after hearing. The defendants thereupon filed a petition against plaintiffs and their surety on their bond, for assessment of damages, costs and attorneys' fees. Plaintiffs contended that the defendants were limited to the arbitrary amounts allowed in taxing costs in the ordinary equity case but the court held otherwise, deciding that the rule under the Norris Act was different from the rule governing ordinary equity cases, in view of the express language of the act.

Where a bond is taken on the issuance of a temporary restraining order, no further bond need be taken upon issuance of an injunction pendente lite, and if the complaint is thereafter dismissed the court may, in the proceedings, award counsel fees to the defendant's attorney.⁶⁸

67. 6 F Supp 830 (DC ED Mich SD 1934)

68. *Washington Shoe Workers' Union v. United Shoe Workers of America*, — F Supp — (DCD Columbia 1936). In this case it was assumed *arguendo* that expenses could be allowed in the proceeding only if a bond were taken. In *Houston &*
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No. Texas Motor Freight Lines v. International Brotherhood of Teamsters, 27 F Supp 262 (DC ND Tex 1939), where it appeared that the bond did not comply with the statutory requirements, the court said that expenses could nevertheless be recovered in the proceeding. The statute, said the court, requires a

Section 224. Limitation on Prohibitions Included in Restraining Orders and Injunctions.

Section 9 of the act provides as follows: "No restraining order or temporary or permanent injunction shall be granted in a case involving or growing out of a labor dispute, except on the basis of findings of fact made and filed by the court in the record of the case prior to the issuance of such restraining order or injunction; and every restraining order or injunction granted in a case involving or growing out of a labor dispute shall include only a prohibition of such specific act or acts as may be expressly complained of in the bill of complaint or petition filed in such case and as shall be expressly included in said findings of fact made and filed by the court as provided herein."

Speaking generally of the purpose of section 9 of the Norris Act, the United States Supreme Court has stated⁶⁹ that "the evident purpose of this section, as its history and context show, was not to preclude mandatory injunctions, but to forbid blanket injunctions against labor unions, which are prohibitory in form, and to confine the injunction to the particular acts complained of and found by the court."

In *American Steel Foundries v. Tri-City Central Trades Council*,⁷⁰ the United States Supreme Court so construed the Clayton Act as to permit the employment of "missionaries" notwithstanding that there was violence used by the labor union in connection with the past history of the dispute.⁷¹ Nevertheless, lower federal courts continued to issue blanket injunctions restraining all labor activity, where violently exercised in the past.⁷²

liberal construction to such effect "It could hardly mean," said the court in speaking of section 7(e), "that expenses were to be allowed, only, if the bond were given"

69. *Virginian Railway Co v System Federation*, 300 US 515, 563, 57 S Ct 592, 607, 81 L Ed 789 (1937)
70. 257 US 184, 42 S Ct 72, 66 L Ed 189, 27 ALR 360 (1921)

71. See Note, 43 Harv L Rev 966

(1930), where, in connection with the *American Steel Foundries* case, the following is said "Although analogies from other fields of equity jurisprudence cannot be conclusive it is significant that the Supreme Court seems to have adopted the view that lawful acts may not be enjoined, even though unlawful acts have been committed."

72. See *Vaughan v Kansas City*

6. APPEALS

Section 225. Provisions of the Act.

Section 10 of the act provides as follows: "Whenever any court of the United States shall issue or deny any temporary injunction in a case involving or growing out of a labor dispute, the court shall, upon the request of any party to the proceedings and on his filing the usual bond for costs, forthwith certify as in ordinary cases the record of the case to the circuit court of appeals for its review. Upon the filing of such record in the circuit court of appeals, the appeal shall be heard and the temporary injunctive order affirmed, modified, or set aside with the greatest possible expedition, giving the proceedings precedence over all other matters except older matters of the same character."

Section 226. Judicial Interpretations.

It has been held in spite of this section, that a preliminary injunction issued by the Supreme Court of the District of Columbia which restrained picketing until the final hearing of the case may not be appealed from, because not constituting a "final order, judgment or decree" nor an interlocutory order affecting the possession of property so as to come within the purview of a 1929 statute regulating appeals in the District of Columbia from judgments and decrees of the Supreme Court.⁷³

It has also been held in Idaho⁷⁴ in connection with the anti-injunction statute in force there, that the State Supreme Court does not have any jurisdiction to review a temporary injunction issued over the objection of the union that the controversy involved a "labor dispute" where the trial judge, contending no "labor dispute" existed, refused to certify the record to the Appellate Court. The Supreme Court indicated in its decision that the reason for its holding was that it preferred to pass upon the anti-injunction

Moving Picture Operators' Union, 36 of Columbia 1935).

F(2d) 78 (DC WD Mo 1929).

74. Boise Grocery Co. v. Stevenson,

78. New Negro Alliance v. Harry Kaufman, 78 F(2d) 415 (CCA Dist

58 Idaho 344, 73 F(2d) 947 (1937).

statute and the application thereof, after a trial upon the merits.

In Pennsylvania it has been held that an appeal from a temporary injunction will lie, but the court said that "The general rule is firmly established that upon an appeal from a decree refusing, granting or continuing a preliminary injunction, we will examine the record only for the purpose of determining whether reasonable grounds existed for the decree entered, and the merits of the case will not be considered by us unless it clearly appears that there was no basis for the action of the court below, or that the rules of law relied upon are either erroneous or without application. In appeals of this character any expression of opinion upon the merits of the case should be withheld until after final hearing and decree."⁷⁵

7. TRIAL BY JURY IN INDIRECT CONTEMPT CASES

Section 227. Provisions of the Act.

Section 11 of the act provides as follows: "In all cases arising under this chapter in which a person shall be charged with contempt in a court of the United States (as herein defined), the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the contempt shall have been committed: Provided, That this right shall not apply to contempts committed in the presence of the court or so near thereto as to interfere directly with the administration of justice or to apply to the misbehavior, misconduct, or disobedience of any officer of the court in respect to the writs, orders, or process of the court."

The language of section 12 is as follows: "The defendant in any proceeding for contempt of court may file with the court a demand for the retirement of the judge sitting in the proceeding, if the contempt arises from an attack upon the character or conduct of such judge and if the attack occurred elsewhere than in the presence of the court

75. *Yale Knitting Mills v. Knitgood Workers Union*, 334 Pa 23, 5 A(2d) 323 (1939).

or so near thereto as to interfere directly with the administration of justice. Upon the filing of any such demand the judge shall thereupon proceed no further, but another judge shall be designated in the same manner as is provided by law. The demand shall be filed prior to the hearing in the contempt proceeding."

Section 228. Judicial Interpretations.

The right to trial by jury under the Clayton Act, though mandatory,⁷⁶ is limited, as has been seen, to cases where the alleged contempt also constitutes a crime.⁷⁷ Violation of an injunction order not being necessarily a crime, the right to trial by jury to probe the evidence to support the violation in a contempt proceeding does not exist under the Clayton Act.⁷⁸ No such limitation appears in the Norris Act. But of course a person cited for contempt of an injunction in a labor controversy where the injunction was issued upon the ground that no "labor dispute" existed cannot invoke the right to trial by jury provided for by section 11.⁷⁹ Nor can such right be invoked even though the main controversy involves a "labor dispute," where citation for contempt is predicated upon resistance of execution by an officer of the court, such as a Marshal, of a writ which the officer was required to execute by order of the court.⁸⁰ It has been held that contempt proceedings will be dismissed where the complaint in the action is not verified, notwithstanding the lack of verification was not called to the attention of the trial judge.⁸¹ It has also been held that, though contempt of an injunction order will not be excused where bad advice of counsel sought in good faith induced

76. *Michaelson v. United States*, 266 U.S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 27 ALR 451 (1924).

77. See *Canoe Creek Coal Co. v. Christenson*, 281 F. 559 (DC WD Ky 1922), reversed on another ground sub nom. *Sandefur v. Canoe Creek Coal Co.* 293 F. 379 (CCA 6, 1923), 266 U.S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 27 ALR 451 (1924).

78. *Talisfero v. United States*, 200

F. 214 (DC WD Va 1922) aff'd 290 F. 906 (CCA 4, 1923).

79. *Hill v. United States*, 84 F.(2d) 27 (CCA 3, 1936), reversed on other grounds, 300 U.S. 105, 57 S. Ct. 347, 81 L. Ed. 537 (1937).

80. *Russel v. United States*, 86 F.(2d) 389 (CCA 8, 1936).

81. *Cushman v. Mackesy*, 200 A. 505 (Maine, 1938).

the commission of the act which constituted the contempt, the circumstances will operate to mitigate punishment,⁸² and in one case sentence was suspended pending good behavior where violation of the injunction was the result of bad advice.⁸³ The situs of trial in cases involving indirect contempt is the place where the alleged contempt took place and not the place where the person alleged to have committed the act of contempt resides.⁸⁴

A proceeding in equity for punishment for civil contempt must be dismissed where the parties in the interim effect a settlement of the controversy which was the basis of the original suit in equity.⁸⁵ But the settlement of the underlying controversy does not deprive the court of its power to punish for contempt the disobedience of its mandates, since here there is no private quarrel involved, but rather the disregard for and the disobedience of the orders of a court of law, which it cannot lie in the power of private parties to mitigate by private settlement.⁸⁶

Section 229. Collateral Attack upon Validity of Injunction Order.

The question has been raised whether the improper issuance of an injunction may be attacked collaterally, in a proceeding to punish violation of the injunction. Minnesota and New York, each answering the question in relation to an Anti-Injunction Act patterned upon the Norris Act, have parted company, and a Kansas holding is in accord with the New York authority. In *Reid v. Independent Union*⁸⁷ the defendants were convicted of contempt for violating an injunction restraining picketing. On appeal, they

82. *Blechman v Osman*, 98 NYLJ 190 (1937)

83. *Busch Jewelry Co v Silvers*, 169 Misc 305, 8 NYS(2d) 592 (1938)

84. *Houston & No Texas Motor Freight Lines v International Brotherhood of Teamsters*, 27 F Supp 262 (DC ND Tex 1939)

85. *Gompers v. Buck's Stove & Range Company*, 221 US 418, 31 S Ct

492, 55 L Ed 797, 34 LRA(NS) 784 (1911)

86. *Gompers v Buck's Stove & Range Company*, 221 US 418, 31 S Ct 492, 55 L Ed 797, 34 LRA(NS) 784 (1911); *Houston & No. Texas Motor Freight Lines v. International Brotherhood of Teamsters*, 27 F Supp 262 (DC ND Tex 1939)

87. 200 Minn 599, 275 NW 300 (1937).

urged the impropriety of the injunction in view of the Anti-Injunction statute. The court held, however, that the injunction was not open to collateral attack.⁸⁰ Thereafter a writ of habeas corpus was taken out under a commitment issued upon the conviction, but upon return of the writ it was ordered discharged and the petitioner was ordered returned to the custody of the sheriff. Upon appeal the order discharging the writ of habeas corpus was affirmed.⁸¹

In *People ex rel. Sandness v. Sheriff of Kings County*,⁸² on the other hand, the Supreme Court discharged certain defendants from custody on a writ of habeas corpus where they had been imprisoned for violation of a labor injunction. The court held that the injunction had been issued in direct violation of the Anti-Injunction Act and other legislation governing the issuance of injunctions,⁸³ and could consequently be collaterally attacked.

80. Accord *Shapiro v. Amalgamated Watchmakers' Union*, 2 CCH Lab Cas 222 (Super Ct Los Angeles, 1940); *Bulletin Pub Co v. O'Connor*, 1 CCH Lab Cas 1309 (Super Ct Los Angeles 1939); *Sontag Chain Stores Co. v. Joint Executive Board*, 2 CCH Lab Cas 375 (Super Ct Los Angeles 1940); *In re Fortenbury*, — P(2d) — (Cal 1940); *Ossey v. Retail Clerks Union*, 326 Ill 405, 158 NE 162 (1927).

81. *State ex rel. Voorhees v. Syck*, 202 Minn 252, 277 NW 926 (1938) cert. den. 305 U.S. 604, 59 S Ct 64, 83 L Ed 383 (1938).

82. 164 Misc 355, 299 NYS 9 (1937).

83. The holding of the New York court in the *Sandness* case must be understood in the light of a rule existing in that state, that temporary injunctions are the creature of statute. *Bachman v. Harrington*, 184 NY 468, 77 NE 657 (1906); *Micamold Radio Corporation v. Beebe*, 156 Misc 390, 232 NYS 77 (1935). Cf. *Pomeroy, Equity Jurisprudence*, 5th Edition, see 536, *De Hart v.*

Hatch, 3 Hun 375 (1875), and *People v. Nichols*, 79 NY 582 (1900). Section 882 of the New York Civil Practice Act requires applications for temporary injunctions to be made on notice. No notice having been given of the application for the injunction sought collaterally to be attacked, the court found that no jurisdiction had been obtained and the proceedings culminating in the petitioner's imprisonment were a nullity. The language of the court in the *Sandness* case (*supra*), however, indicates that collateral attack might be made upon a decree purporting to satisfy the provisions of the Anti-Injunction Act, as by finding that no labor dispute existed, which in the mind of the justice entertaining the habeas corpus proceeding did not in fact satisfy those provisions ("In addition the injunction order was void because it was issued in a case governed by Section 876a of the Civil Practice Act without compliance with the conditions precedent to give the court jurisdiction in such cases," p. 15).

In Kansas, in connection with an Anti-Injunction Act modelled after the Clayton Act, the court's holding agreed with the decision of the New York case in *People ex rel. Sandness v. Sheriff of Kings County* (supra). In *Giltner v. Becker*,⁹² the petitioner, jailed for indirect contempt of an injunction order, sued out a writ of habeas corpus alleging that the restraining order enjoining further picketing, under which he had been held in contempt for picketing, was issued without notice, notwithstanding that the controversy was a labor dispute and that he was an ex-employee. The court allowed the writ in spite of the general rule against collateral attack upon the validity of equity's mandates. "We conclude," said the court, "That the petitioner, defendant in the injunction action, an ex-employee, having been an employee of the plaintiff until three months before the issuing of the restraining order, was such as to come within the provisions of the statute against whom a restraining order could not be issued, in a matter involving a dispute concerning terms or conditions of employment without a previous notice as provided in R. S. 60-1104 and 60-1107, and because the restraining order was issued against him without such notice and without the necessary allegations to bring the case under any of the exceptions to the general rule, the order was issued without jurisdiction or authority and was void."

The problem here presented is not easy to resolve. On the one hand is suggested the generally accepted rule barring collateral attack upon equity decrees, where jurisdiction is possessed over the parties or the subject matter of the action.⁹³ On the other hand, however, is presented the principle likewise well accepted that collateral attack may be directed against an improper assumption of equity jurisdiction patently excessive of equity's historically understood limitations.⁹⁴ Equally instinct with contention is the

92. 133 Kan 170, 298 P 780 (1931).

93. *Venner v. Gt Northern Rwy*, 209 US 24, 28 S Ct 828, 52 L Ed 666 (1908). See also *Tonnelle v. Wetmore*, 195 NY 436, 88 NE 1068

(1909); 1 Pomeroy Equity Jurisprudence, (4th Ed 1918) 53-56, In re Debs, 158 US 564, 15 S Ct 900, 39 L Ed 1092 (1894).

94. *Ex parte Sawyer*, 124 US 200,

policy to be followed in determining the permissibility of collateral attack. The social interest in the maintenance of peace, coupled with the provision for quick appeal contained in Anti-Injunction Acts, would seem to induce a determination against the permissibility of collateral attack. But factors equally deserving of weight are the extent to which unfriendly attitudes towards labor activities among lower court judges may impair the rights granted labor by Anti-Injunction Acts, combined with general knowledge of the manner in which "temporary" injunctions may break lawful strikes and imprison innocent victims of judicial mistakes.⁹⁵ Deserving of weight in this connection is the argument that modern Anti-Injunction Acts such as the Norris Act and prototype State Acts are grounded at least in part in a desire by the legislature to reinstate historical limitations upon the jurisdiction of equity. Anti-Injunction Acts have generally been sustained, to be sure, as mere procedural guides to the allegedly unchanged jurisdiction of courts of equity in the administration of an equally unchanged substantive law.⁹⁶ The cases passing upon the constitutionality of the Acts have yet to give consideration to the contention that the labor injunction as applied by equity courts subsequent to the *Debs* case transcended the jurisdiction of equity in restraining the exercise of personal rights through blanket injunctions extending to lawful

8 S Ct 482, 31 L Ed 402 (1888). See also *Bachman v. Harrington*, 184 NY 458, 77 NE 657 (1906).

95. "When a lapse occurs with the resultant unlawful imprisonment of one, the most effective cure is by a writ of habeas corpus. The slow processes of appeal may bring relief so belatedly as to render it practically valueless." *People ex rel Sandness v. Sheriff of Kings County*, 164 Misc 355, 299 NYS 9 (1937). The case cited illustrates the realism which modern jurists have emphasized as a factor qualifying the asserted sterility of legal doctrine. The injunction in the *Sandness* case

was issued in the second judicial department which in New York is said, by labor to be an outstanding halliwick of anti labor law. The original injunction, issued as it was with flagrant unconcern for legislative declarations contained in the Anti-Injunction Act, was tested collaterally in the first judicial department, where, according to labor, the judiciary apparently pays greater respect for law other than that laid down by judicial decision and anti-labor sentiment.

96. See *supra*, section 204, and *infra*, sections 435, 436.

as well as unlawful acts, without balance of equities. It is nevertheless submitted that Anti-Injunction Acts may be considered from the point of view of a historical corrective, thereby affecting the very jurisdiction of equity courts, with consequent basis for arguing that injunctions issued in violation of the Acts may be collaterally attacked.

8. ABOLITION OF THE RULE OF VICARIOUS LIABILITY

Section 230. Provisions of the Act.

Section 6 accomplishes one of the purposes of the Norris Act, i. e., abolition of the rule of vicarious liability in connection with industrial controversies by providing as follows: "No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof."

Section 231. Background of the Act.

The background of Section 6 of the Act must be understood in the light of agency principles. The common law rule of vicarious liability is generally applied not to the relationship of principal and agent but rather to that of master and servant, because of the greater control exercised by the master over the movements of his servant. Liability of the principal for his agent's acts follows only upon a showing of the agent's authority to do the act, or the principal's ratification thereof. This line of distinction has been accepted by the Restatement of the Law of Agency.⁹⁷

⁹⁷ Section 219 Section 220 (2d) indicates several criteria to determine the master-servant relationship: (1) extent of control exercised by the master over the servant's work; (2) whether or not the employee is engaged in a distinct occupation or business, (3) whether the kind of work involved is usually performed with or without the employer's supervision, (4) the skill required in the particular occupation; (5) whether or not the employer supplies the tools and the place of

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In abolishing the rule of vicarious liability, the present section announces a preference for the principal-agent relationship over the master-servant relationship insofar as the union's liability for the torts of its members are concerned. The distinction has been explained with approval as follows: "It is apparent that the latter conditions (master-servant relationship) do not exist in the case of an ordinary member, on strike or otherwise. Even officers, empowered to negotiate for and manage the union, do not have those attributes characteristic of the agent who is a servant. Thus for the most part it would seem inconsistent with accepted doctrine to say that a union is liable for the acts of members which are not authorized or ratified just as it would be inconsistent to hold a corporation liable for unauthorized acts of agents who are not servants."⁹⁸ A wider view of the ideas underlying the rule of vicarious liability will serve to clarify perhaps even better the innovation brought about by this section of the Act. Various explanations have been offered to explain the rule,⁹⁹ but all find a focal point in the notion of public policy that the rule serves to spread the risk of business enterprise.¹ There will thus be seen to be small justification for extending the rule to labor unions or employers' associations, for they can in no sense be said to be involved in a profitable business enterprise in attempting to secure for their members the benefits of unionization or the lack of it.

employment. . . . "The relationship of master and servant is one not capable of exact definition." Section 220 (2b).

98. Note, 38 Col L Rev 466 (1938).

99. Historical research has revealed that the rule seems to have sprung from a case decided without precedent or reason stated by Judge Hoit in *Jones v Hart*, 90 Eng Rep 1255, in the last years of the 17th Century.

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1. "It is thought that the hazards of business should be borne by the business directly. It is reasoned that if this new cost item is added to the expense of doing business, it will ultimately be borne by the consumers of the product, that the consumers should pay the costs which the hazards of the business have incurred." Note, 38 Yale L Jour 584 (1937).

Section 232. The Rule of Vicarious Liability in the Absence of Statute.

In the absence of statute such as the instant section of the Act, the rule of vicarious liability has everywhere been applied to labor unions. Thus, it has been held that mere membership in a labor union without more is sufficient to predicate liability for acts of individuals done in behalf of the union, or a labor activity undertaken in behalf of the union.² The same result has followed upon the theory that all the members are engaged in a general conspiracy, the unlawful acts of the particular members being viewed as necessary incidents of the conspiracy.³ It has also been held that, notwithstanding the fact that strikers have been instructed to use peaceable and orderly methods of persuasion, the coercive acts of the strikers will be attributed to the union where coercion constitutes a continuous activity.⁴

Nor does the instant section completely absolve the union from liability for its members' torts, for authorization or ratification may be found to have been implied in such a manner as practically to reinstate the rule of vicarious liability.⁵ Thus in *Clarkson v. Laiblan*,⁶ it was held that where an officer of a union has authority to call strikes, the union may be held liable for the damages occasioned by the call-

2. The most prominent case in point is the Danbury Hatters case (*Loewe v. Lawler*, 208 US 274 28 S Ct 301, 52 L Ed 488, 13 Ann Cas 815 [1908]). Other cases are *Illinois Central R. R. Co. v. International Ass'n of Machinists*, 190 F 910 (CC ED Ill 1911), *Nealty v. Local Union*, 5 Law & Labor 307 (Federal Court, 1923); *O'Neil v. Behama*, 182 Pa 236, 37 A 843 (1897). Cases holding to the contrary are *Diamond Block Coal Co. v. United Mine Workers*, 188 Ky 477, 222 SW 1079 (1920); *Schneider v. Local Union*, 116 La 270, 40 S 700 (1905); *Michaels v. Hillman*, 112 Misc 395, 183 NYS 105 (1920).

3. *United States v. Debs*, 64 F 724 (CC ND Ill 1894); *Gulf Bag Co. v.*

Suttner, 124 F 467 (CC ND Cal 1903), *Dayton Mfg. Co. v. Metal Polishers' Union*, 11 Ohio Sys and CO Dec 643 [1901]; *Patch Manufacturing Co. v. Protection Lodge*, 77 Vt 294, 60 A 74 (1905).

4. *Cumberland Glass Mfg. Co. v. Glass Bottle Blowers' Ass'n*, 59 NJ Eq 49, 46 A 208 (1899).

5. Note must be made of the difficulty of determining in the given case whether liability of the union is predicated upon the doctrine of respondeat superior or whether, on the other hand, the source of liability is found in authorization or ratification.

6. 202 Mo App 682, 216 SW 1620 (1919).

ing of a strike, though he called an unlawful strike of which most of the members of the union were wholly ignorant. It has also been held that violence is so necessary a consequence of strikes or picketing that those who called the strike are liable for the consequential wrongdoing.⁷ The fact that officials and strikers had repeatedly asserted the necessity for utilization of peaceful means has been held to be no bar to imposing liability upon them, because they were connected in a common purpose with violent men.⁸ Authorization to unionize has been held to imply authority to call a boycott,⁹ and in one case it was held that members of a trade union might be held liable for pickets' acts because the members presumptively had knowledge thereof.¹⁰ Liability of the union and all its members has also been predicated upon the fact that the union neglected to discipline the wrongdoing members,¹¹ or paid the fine imposed upon such members.¹²

7. *Connett v United Hatters*, 76 NJ Eq 202, 74 A 198 (1909). And this although the evidence failed to disclose that the strikers, pickets or other members of the union were responsible for the doing of the unlawful acts. *United States v Railway Employees Department* 283 F 479 (1922). *Contra* *Cumberland Glass Mfg. Co v Glass Blowers*, 59 NJ Eq 49, 46 A 208 (1900).

8. *United States v. Ry Employees Department A.F.L.* 283 F 479 (DC ND Ill 1922). *Campbell v Johnson*, 167 F 102, 92 CCA 554 (CCA 9, 1909); *Michaels v Hillman*, 112 Misc 395, 183 NYS 195 (1920). *Patch v Lodge*, 77 Vt 294, 60 A 74 (1905). *Contra* *Russel v Stampers*, 57 Misc 96, 107 NYS 303 (1907).

9. *Lawlor v. Lowe*, 235 US 522, 35 S Ct 170, 59 L Ed 341 (1915) (*Danbury Hatters Case*).

10. *Aluminum Castings Co. v Local, International Molders Union*, 197 F 221 (DC WD NY 1912). Courts have taken cognizance of the less intimate relationship between

local and national unions, and have required much more evidence of authorization or ratification to bind the latter for the acts of the former. See *United Mine Workers v Coronado Coal Co* 259 US 344 42 S Ct 570, 66 L Ed 975, 27 ALR 762 (1922).

11. *Kroger Grocery & Baking Co v Retail Clerks*, 250 F 890 (DC ED Mo 1918). *Nederlandsch v Stevedores Soc* 265 F 397 (DC ED La 1920). *Southern Ry Co v Machinists Local Union*, 111 F 49 (CC WD Tenn 1901). *Franklin Union v. People*, 220 Ill 335, 77 NE 176 (1906). *United Traction Co v Druggan*, 115 Misc 672 189 NYS 39 (1921). See also *Alaska S S Co v. International Longshoremen's Ass'n*, 236 F 964 (DC ND Wash, 1916) where it was held that a trade union, conducting a strike, is liable for the unlawful acts of members and others associating themselves with the strikers, unless such acts be disavowed, and, in the case of members, the offenders disciplined or expelled.

12. *Hillenbrand v. Building Trades*

A Senate report which preceded enactment of the Norris Law pointed out that Section 6 applies both to the employers and employees:¹³ "It will be observed that this section, as do most all of the other prohibitive sections of the bill, applies both to organizations of labor and organizations of capital. The same rule throughout the bill, wherever it is applicable, applies both to employers and employees, and also to organizations of employers and employees."

The instant section of the Norris Act may be considered from three points of view: (1) as having sought to affect the rule governing liability to injunction; (2) as having been also intended to affect the rule governing liability to contempt; (3) as having likewise been intended to affect the rule of vicarious liability in connection with civil suits to recover damages for unlawful labor activity. In the last connection, the Sherman Act would be affected.¹⁴

It would seem clear that Section 6 is intended to affect the common law rule governing liability to injunction, but whatever doubt may be had upon this score, or upon the question generally whether the Norris law was enacted with intent to abolish the rule of vicarious liability in connection with liability to injunction, is resolved by Section 7(a) of the Act, which provides that ". . . no injunction or temporary restraining order shall be issued on account of any threat or unlawful act excepting against the person or persons, association, or organization making the threat or committing the unlawful act or actually authorizing or ratifying the same after actual knowledge thereof. . . ."

Section 6 has added little if anything to the law governing liability to contempt, since at common law the penal nature of such liability insulates the principal from censure for the agent's acts, as for the acts of any other third party, in the absence of the principal's participation or direction.^{14a}

It thus appears that the Norris Act, unlike the

Council, 14 Ohio Dec 628 (1904).

13. Senate Report No. 163, 72d Congress, First Session, p 19.

14. See *infra*, section 421.

[1 Teller]—42

14a. See *State v. Shumaker*, 200 Ind 623, 157 NE 769, 58 ALR 954 (1927); *Sherry v. Janov*, 137 NYS

792 (1912,

Clayton Act, contains no express limitation upon the nature of the connection between the act alleged to constitute a contempt, and the actor. By Section 19 of the Clayton Act, it was provided that "every order of injunction or restraining order shall set forth the reasons for the issuance of the same, shall be specific in terms, and shall describe in reasonable detail, and not by reference to the bill of complaint or other document, the act or acts sought to be restrained, and shall be binding only upon the parties to the suit, their officers, agents, servants, employees, and attorneys, or those in active concert or participating with them, and who shall, by personal service or otherwise, have received actual notice of the same." (italics supplied). There is thus revealed a defect both in the Clayton and Norris Acts. The Clayton Act imposes restrictions upon liability to contempt, without counterpart emphasis upon the basis of liability to injunction. The Norris Act, on the other hand, has limited liability to injunction order, while leaving untouched the uncertainties of legal doctrine governing the connection at common law between the injunction order and the person held in contempt for violation thereof.

At common law, members of a class may be held for contempt even though not named as defendants except by representation, and even though they are not clearly shown to have notice of the injunction,¹⁵ although there is authority to the effect that, in the absence of agency, notice is required to be shown.¹⁶ Some courts hold that, where the doer of the alleged deed of contempt is not a member of the class, he may yet, according to the weight of authority,

15. *Shaughnessy v. Jordan*, 184 Ind 499, 111 NE 622 (1915). "In labor cases, it is common not only to enjoin representative defendants, the members of the class, their agents and all persons aiding or assisting them, but also all persons whatsoever to whom notice of the injunction shall come." *Landis, Cases on Labor Law* (1934), p. 412n. Other

sources are Frankfurter and Greene, *The Labor Injunction* (1930), pp. 86-89; Allen, *Injunction and Organized Labor* (1904), 28 *Am. L. Rev.* 323. But see *Newark Int'l Baseball Club, Inc. v. Theatrical Managers, Agents and Treasurers Union*, 125 NJ Eq 575, 7 A(2d) 170 (1939).

16. *Armstrong v. Superior Court*, 173 Cal 341, 159 P 1176 (1916).

[1 Teller]

be held liable if he is shown to have actual knowledge of the injunction,¹⁷ but others hold that mere notice of the injunction, where the non-member of the class had not been served with a copy of the injunction order, is insufficient to predicate punishment for contempt.¹⁸

Section 233. Application of the Act.

In *Mayo v. Dean*,¹⁹ the court interpreted Section 6 in a doubtful manner. There, two defendants against whom the federal district court issued an injunction in a labor dispute appealed to the circuit court because, as to these two, "there was no evidence of actual participation in, or actual authorization of the commission of, the overt acts." The circuit court held, however, that even were this true, section 6 would afford no protection: "This might prevent punishment for contempt or the recovery of damages, but clearly was not intended to apply to the issuance of an injunction to prevent future acts of coercion in a case where such relief would be proper." Section 7 (a) of the Act which, as seen in the preceding section, clearly abolishes vicarious liability to injunction order, was ignored by the court. The several holdings contrary to *Mayo v. Dean* (supra) would seem to reflect greater respect for the language of the Act.²⁰ In *Davis v. McGuigan*²¹ union liability for the unlawful acts of its organizers was held properly established under the section of the

17. *McCourtney v. United States*, 201 F 497 (CCA 8, 1923); *O'Brien v. People*, 216 Ill 354, 75 NE 108 (1905); *Anderson v. Indianapolis Drop Forging Co* 34 Ind App 100, 72 NE 277 (1904); *State ex rel. Lindley v. Grady*, 114 Wash 692, 195 P 1049 (1921), *State v. Bittner*, 192 W Va 677, 136 SE 202 (1926)

18. *Berger v. Superior Court*, 175 Cal 719, 167 P 143 (1917); *Rigas v. Livingston*, 178 NY 20, 70 NE 107 (1904). See Annotation, 15 ALR 386 (1921) "Contempt: Violation of Injunction by one not a Party to

Injunction Suit"

19. 82 F(2d) 554 (CCA 5, 1936). See also *Quinton's Market, Inc. v. Patterson*, 21 NE(2d) 546 (Mass 1939).

20. *Cinderella Theatre Co. v. Sign Writers Local Union*, 6 F Supp 164 (DC ED Mich SD 1934), *Heintz Mfg. Co. v. Local U. 20 F Supp 116* (DC ED Pa 1937), *Diamond Full Fashioned Hosiery Co. v. Leader*, 20 F Supp 467 (DC ED Pa 1937) appeal dismissed 99 F(2d) 1001 (CCA 3, 1937).

21. 36 Pa D & C 554 (1939).

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Pennsylvania anti-injunction act which corresponds to Section 6 of the Norris Act, where officers of the union knew about and accepted benefits from, but did not repudiate nor try to prevent the doing of the acts. "A union like any other individual or group of persons" said the court, "cannot stand by and accept the benefits of acts which they claim to be unauthorized and then disclaim responsibility for them."

CHAPTER FIFTEEN

N. I. R. A., COMPANY UNIONS AND THE RAILWAY LABOR ACT

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Section 234. Labor Provisions of the National Industrial Recovery Act (1933).

Section 7a of the NIRA provided “(1) that employees shall have the right to organize and bargain collectively through representatives of their own choosing, and shall be free from the interference, restraint or coercion of employers of labor, or their agents, in the designation of such representatives for the purpose of collective bargaining or other mutual aid or protection; (2) that no employee and no one seeking employment shall be required as a condition of employment to join any company union or to refrain from joining, organizing or assisting a labor organization of his own choosing ”

While the NIRA was declared unconstitutional by the United States Supreme Court¹ so immediately after its enactment as not to permit of any substantial effect upon the labor movement, the Act nevertheless has had four lasting consequences in the development of American labor law. First, it acted as an impetus to labor organization. The American labor movement had theretofore not yet

1. *Schechter Poultry Corp. v United States*, 295 US 495, 35 S Ct 837, 79 L Ed 1670, 97 ALR 947 (1935).

recovered from a major nationwide depression and was slowly stagnating.³ The recognition of a "right to organize" coupled with employee representation in code authorities formed under the Act coincided with improving economic conditions to constitute natural encouragements to the union organizer and to the unorganized. The Norris Act was but new and relatively untried legislation when the NIRA was enacted, nor did the Norris Act achieve such popularization as did the NIRA. William Green announced in 1933 that the American Federation of Labor had increased its membership by 1,300,000 since passage of the NIRA and as a result thereof.⁴

Second, it further codified legislative antipathy to the yellow-dog contract, going further than the Norris Act to prohibit the very execution of such a contract as a condition to the securing of employment.

Third, the Act emphasized the care necessary in the drafting of labor legislation, to preserve labor's right to strike, picket and boycott. It has been seen how the Sherman and Clayton Acts were distorted by the judiciary to the detriment of labor.⁵ While the labor provisions of the NIRA did not suffer as drastic a fate, the equivocation which labor's rights to resort to the strike, picket and boycott met at the hands of several courts induced among labor leaders and labor lawyers an attitude of still greater circumspection toward legislation of the future. No sooner had the NIRA, and state Acts patterned upon it, found their way into the statute books, than courts advanced the contention that strikes, picketing and boycotts were thereby outlawed. And in one case it was actually held that, in view of the Acts, "strikes are forbidden by the public policy of nation and state."⁶ A like contention advanced was that the Acts, in providing for the mediation of disputes, made resort to mediation a condition to the right

3. *New Republic*, January 3rd, thirteen.
1934, pp. 210, 211.

4. *New York Times*, October 2nd, 1933, p. 1.

5. See *supra*, chapters twelve and

6. *Elkind v. Retail Clerks Int'l Protective Assn.* 114 NJ Eq ann 169 A 494 (1933).

to engage in any form of labor activity for the enforcement of any demand. And a New Jersey court so held.⁶ So also, the argument was advanced in one case that the Act outlawed the closed shop contract, but it was held that such agreements were binding in spite of the Act.⁷ Express reservation of the validity of closed shop contracts and the right to strike in the National Labor Relations Act and similar state statutes were but two of the consequences of labor's experience under the NIRA. It was suggested in one case in New Jersey that the National Industrial Recovery Act had outlawed national labor unions,⁸ but on appeal the view of the court below was reversed, the court saying:⁹ "The Vice-Chancellor would . . . prevent the employees of the individual plant from participating in any organization but one composed of the plant's own employees, under the sole leadership of persons selected from its members, and limit their activities to seeking an equitable adjustment of their grievances relating to labor conditions in their own plant. A congressional purpose to effect this radical departure from a firmly established policy will not be implied. It must be expressed in clear and unequivocal language."

Section 235. The Company Union.

A fourth significant and lasting consequence of the NIRA is found in the fact that the Act popularized and extended the employment of the company union. This is not to say,

6. *Lichtman v. Leather W. Industrial Union*, 114 NJ Eq 596, 169 A 498 (1933). *Contra Bayonne Textile v. Am. Fed. of Silk Workers*, 116 NJ Eq 146, 172 A 551, 92 ALR 1450 (1934) modifying 114 NJ Eq 307, 168 A 799 (1933). *Bernstein v. Retail Cleaners & D. Asso.* 31 Ohio NP(NS) 433 (1934); *International Alliance v. Rex Theatre Corp.* 73 F(2d) 92 (CCA 7, 1934). See also, in this connection, *Durable Sportswear Co.* NYLJ September 13th, 1938, p. 8, refusing to grant an employer an

injunction against picketing because the employer had refused, though requested by the Recovery Administrator, to refer the quarrel to the Labor Board for mediation.

7. *Farulla v. Freundlich*, 153 Misc 738, 277 NYS 47 (1934).

8. *Bayonne Textile Corporation v. American Federation of Silk Workers*, 114 NJ Eq 307, 168 A 799 (1933).

9. 116 NJ Eq 146, 172 A 551, 92 ALR 1450 (1934).

of course, that the NIRA did so by express or even implied provision. The company union was rather, like its predecessor the yellow-dog contract, a creature of lawyers' ingenuity. The NIRA publicized the respectability of trade unions. Employers diverted the organizational drive brought on by the NIRA through creation or domination of resulting employee organization.¹⁰ In *Sherman v. Abeles*,¹¹ it was held that sponsorship by an employer of a company union was not necessarily violative of the New York State prototype of the NIRA. The legal talents of the labor movement were thus presented with an added obstacle to union organization which they were accordingly careful to outlaw, as shall hereafter be seen,¹² in the National Labor Relations Act. Since the company union has played an important role in the history of American industrial relations, it will receive a more extended consideration in subsequent sections.

Section 236. The Company Union—Effect of Policies of National War Labor Board.

The term "company union" is closely associated in the public mind with the NIRA. The NIRA, to be sure, gave a decided impetus to the development of the company union, an impetus, moreover, whose effects have continued even to the present time. But the company union is much older than the NIRA. We must go back to the World War to appreciate the part which the company union has taken in the subject of collective bargaining.¹³ In 1918, the Na-

10. See, for a description of the manner in which company unions were utilized immediately upon enactment of the NIRA as a means of warding off bona fide labor unions, *NLRB v. Falk Corporation*, 308 US 453, 60 S Ct 307, 84 L Ed 396 (1940).

11. 265 NY 383, 193 NE 241, 95 ALR 1284 (1934).

12. See *infra*, sections 293-304.

13. Several company unions existed before the World War, but they

were of no great consequence. The company union plan started by William Filene's Sons Company of Boston, Massachusetts, in 1894, still functions today. See Mary La Dame, *The Filene Store, A Study of Employees' Relationship to Management in a Retail Store*. Industrial Relationship Series. Russel Sage Foundation, New York, 1930. In 1915 there came into existence the "Industrial Representation Plan" of the Colorado Fuel & Iron Company

tional War Labor Board was appointed to act in relation to controversies which might interfere with production necessary to the effective conduct of the war. The Board was an agency of voluntary conciliation and arbitration, without coercive powers other than those which were expected from the reaction of public opinion to the recommendations of the Board. The War Labor Conference Board, at whose recommendation the National War Labor Board was appointed, had indicated that two of the basic conceptions to be followed in the Board's work should be (1) that workingmen had the right to organize and to bargain collectively; (2) that employers had the duty to refrain from interfering with trade-union activities. Employers were thus faced with the duty to bargain collectively and, towards this end, to concede unionism or to find a substitute. The company union was this substitute. The National War Labor Board promptly condemned employment of the company union as a device to avoid the duty of genuine collective bargaining, and in a series of decisions asserted labor's right to be free from such legerdemain.¹⁴ "With the end of the World War, and the subsequent disbandment of the National War Labor Board, sustained governmental interest in industrial relations subsided. The attitude of the courts toward labor disputes remained much the same as it had been prior to our entry into the European conflict. The restraining influence of the various agencies set up during the war to maintain industrial relations was lifted."¹⁵ The tendency of the United States Supreme Court to accord broad scope to the powers of legislatures to deal with social problems, which shortly prior to and during the World War was marked,¹⁶ was confounded by laissez-faire holdings subse-

through the initiative of John D. Rockefeller and the collaboration of McKenzie King, former Minister of Labor and later Premier of Canada. See United States Commission on Industrial Relations. Report on the Colorado Coal Strike (Washington, 1915).

14. See Bureau of Labor Statistics,

Bulletin No. 87, entitled "Principles and Policies to Govern Relations between Workers and Employers in War Industries for the Duration of the War."

15 Bureau of Labor Statistics, Bulletin No. 634, p. 219.

16 See *Muller v. Oregon*, 208 US 412, 28 S. Ct. 324, 52 L. Ed. 551.

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quent to the war.¹⁷ The company union declined in some quarters because employers were relieved of the duty to bargain collectively.

Section 237. The Company Union—Post War Developments.

In other and many quarters, the company union continued to flourish. Employees, realizing that the habit of organization which carried over from the war period was a force to be dealt with, extended the use of the company union. It was estimated that while in 1919 only 403,765 workers were governed by company unions, 690,000 were so governed in 1922,¹⁸ while in 1926 the American Federation of Labor asserted that over two million wage earners were working under company unions.¹⁹

The habit of organization generated by industrial relations during the World War was not the only factor which induced employers to sponsor company unions. A second factor was active refusal to recognize and to deal with bona fide trade unions, and consequent utilization of the company union to divert any organizational drive. Thus the meat packers introduced the idea of company unions in 1921 as a consequence of unsuccessful arbitration with the newly organized Stockyard Labor Council, a group of unions affiliated with the American Federation of Labor, and the strikes which followed. A third was the policies which developed during the period during 1923-1929 (the so-called "personnel period"). During this period the company union was employed to provide the machinery for the registering of employees' complaints and suggestions concerning the relationship between management and employees. The prelude to this period was suggested in 1921

(1908); *German Alliance Ins Co v. Lewis*, 233 US 389, 34 S Ct 612, 54 L Ed 1611 (1914); *United States v. Ohio Oil Co.* 234 US 548, 34 S Ct 956, 59 L Ed 1459 (1914)

17. See *Adkins v. Children's Hospital*, 261 US 525, 43 S Ct 394, 67 L Ed 785 (1923).

18. See National Industrial Conference Board, *The Growth of Works Councils in the United States* (1925), Special Report No. 32

19. American Federation of Labor, *Report of Proceedings of the Forty-Sixth Annual Convention* (1926) p. 290.

by the National Association of Manufacturers.²⁰ "The widening movement for the 'open shop' is stimulated by the extension of plans for industrial representation which are being rapidly introduced not only in manufacturing establishments, but in other industrial organizations. A firm foothold has been obtained by the industrial representation idea. If plans for its adoption are wisely introduced, representation should become the most approved method of dealing with labor."²¹

Labor, however, had different ideas. In 1919, the American Federation of Labor condemned the company union in the following terms:²² "In establishing wages, hours and working conditions in their plant, employers habitually use their great economic power to enforce their will. Therefore, to secure just treatment, the only recourse of the workers is to develop a power equally strong and to confront their employers with it . . . In this vital respect the company union is a complete failure. With hardly a pretense of organization, unaffiliated with other groups of workers in the same industry, destitute of funds, and unfitted to use the strike weapon, it is totally unable to force its will. . . ."

Section 238. The Company Union—Effect of Transportation Act of 1920.

In the railroad industry, too, the controversy was carried on. The United States Railroad Administration, a World War Agency, had likewise asserted employees' right to organize free from employer interference. Soon after the railroads were returned to private ownership in 1920, the Transportation Act of 1920 created a Railroad Labor Board of three (consisting respectively of a carrier, union and public representative) with power to in-

20. National Association of Manufacturers, Proceedings of The Twenty-Sixth Annual Convention (1921) p. 21.

21. See, for a description of the manner in which a company union was organized and functioned during

this period, NLRB v Newport News Shipbuilding & Dry Dock Co 308 US 241, 60 S Ct 203, 84 L Ed 219 (1939).

22. American Federation of Labor, Report of Proceedings, Thirty Ninth Annual Convention (1919), p 303

investigate the causes of labor disputes as they arose, and to publish its findings and decisions. Like the National War Labor Board, it had no coercive powers other than which were expected to flow from the force of public opinion.²³ In 1922, Shopmen struck in disregard of the machinery set up by the Transportation Act. The Board, thereupon suggested that the workers who remained in the railroad's employ form an association to maintain effectiveness of the Act. The company union resulted. Its spread received the benediction of two United States Supreme decisions, the first of which emphasized the lack of the Board's power other than by the constraint of publication to order railroads to disestablish company unions,²⁴ and the second of which, citing the first holding as precedent, denied a bona fide trade union's application to punish a railroad for failure and refusal to obey the Board's decision.²⁵ Necessity for a stronger law found expression in the Railway Labor Act of 1926.²⁶

Section 239. The Company Union—Effect of the Railway Labor Act.

The Railway Labor Act was passed in 1926 and amended

23. While the Transportation Act thus accorded no powers to the Board, and otherwise was a mere advisory piece of legislation, it was assumed in a number of cases that strikes in disregard of awards made by the Railroad Labor Board were illegal. *United States v. Railway Employees' Dept.* A. F. of L. 253 F. 479, 286 F. 228, 290 F. 978 (DC ND Ill, 1922, 1923); *Michaelson v. United States*, 291 F. 940 (CCA 7, 1923), rev'd on other grounds in 268 U.S. 42, 45 S. Ct. 18, 69 L. Ed. 162, 35 ALR 451 (1924); *New York, N. H. & H. R. Co. v. Railway Employees' Dept. A. F. of L.* 288 F. 589 (DCD Conn 1923); *Pere Marquette Ry. Co. v. Internat'l Ass'n of Machinists*, 4 Law & Labor, 304 (DC DD Mich 1922); *Great Northern Ry. Co. v. Perkins*, 4 Law

& Labor, 253 (DC WD Wash 1922); *Great Northern Ry. Co. v. Local Great Falls Lodge*, 283 F. 557 (DCD Mont 1922). See also notes, 37 Harv L. Rev. 486 (1924), 8 Minn L. Rev. 323 (1924). In the *Great Northern Ry. Co.* case (supra) the court said "Of the board's functions and orders it suffices to say they are advisory only, the teeth having been drawn from the bill by the Transportation Act."

24. *Pennsylvania R. Co. v. U.S.R.* L.B. 261 U.S. 72, 43 S. Ct. 278, 67 L. Ed. 536 (1922).

25. *Pennsylvania R. System and Allied Lines Federation v. Pennsylvania R. Co.* 267 U.S. 203, 45 S. Ct. 307, 69 L. Ed. 574 (1925).

26. 44 Stat. 577 (1926).

in 1934 to accomplish a twofold purpose. The first is to create a procedure for the avoidance of strikes or lockouts with consequent interruption in the continuity of interstate railroads. The second is to create the prelude to industrial peace—procedure for collective bargaining. An exhaustive discussion of the Act will not be undertaken in this work,²⁷ but an outline of the Act will be presented to indicate its operation generally, and its effect upon the company union.

The first purpose of the Railway Labor Act, i. e., the prevention of costly and disruptive strikes or lockouts, is accomplished by an alternative procedure. The parties can, if they choose, submit to arbitration. If they do so, they are bound by the award of the arbitrators. The alternative procedure comes into operation upon failure or refusal to submit to arbitration. The National Mediation Board, created by the Act, is then required to notify the President of the United States who may thereupon in his discretion create an emergency Board of Investigation to report with respect to the dispute within thirty days. If the President fails to create such a Board, the parties must preserve the status quo for a period of thirty days subsequent to the receipt of notice from the National Mediation Board of its failure to adjust the controversy. If, on the other hand, the President does create an emergency Board of Investigation, the status quo must be preserved for a period of thirty days after such Board has made its report to the President.

The second purpose of the Act, i. e., the creation of machinery to facilitate the process of collective bargaining, was sought to be accomplished in Section 2 of the Act as passed in 1926, which provided that "Representatives,

²⁷ See, for discussions of the Act and of the National Railroad Adjustment Board created thereunder, Spencer, *The National Railroad Adjustment Board, Studies in Business Administration*, The School of Business, Uni. of Chicago (1933), Garrison, *The National Railroad Adjust-*

ment Board A Unique Administrative Agency, 46 Yale L. Jour 568, First Annual Report of the National Mediation Board (1935). The text of the Act, as amended both in 1934 and 1936, may be found in the appendix to this work.

for the purposes of this act, shall be designated by the respective parties in such manner as may be provided in their corporate organization or unincorporated association, or by other means of collective action, without interference, influence or coercion exercised by either party over the self-organization or designation of representatives by the other." The railroads continued to insist upon a right to initiate company union plans, whereupon a railway brotherhood brought suit in the federal court to enjoin such initiation, upon the ground that it constituted interference with its right to organize the workingmen. The district court granted a temporary injunction.²⁸ Nevertheless the railroad recognized what the brotherhood contended to be a company union, and this in spite of the fact that the brotherhood had theretofore exhibited to the railroad authorization cards signed by a majority of the employees of the appropriate class. The brotherhood thereupon instituted proceedings to punish the railroad company for contempt. Punishment at the hand of the district court followed;²⁹ the railroad company was directed to disestablish the company union and to recognize the brotherhood until such time as other representatives might be chosen as a result of a secret ballot. The Circuit Court of Appeals affirmed.³⁰ An appeal was taken to the United States Supreme Court, and as a consequence the company union was accorded its first important judicial treatment, and given its first significant judicial setback. The High Court held the Railway Labor Act constitutional, and the company's initiation of a company union a violation of the terms thereof. The company contended that the Act, if so construed, would constitute an interference with the company's right to hire and fire as it saw fit. To this the Court replied: "The statute is not aimed at this right of the employers but at the interference with the right of

28. *Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks*, the

injunction order is set forth as a footnote to the Supreme Court decision in the case, 281 US 548, 50 S Ct

427, 74 L Ed 1024 (1930).

29. 24 F(2d) 426 (DC SD Tex 1928).

30. 32 F(2d) 12 (CCA 5, 1929).

employees to have representatives of their own choosing. As the carriers subject to the Act have no constitutional right to interfere with the freedom of the employees in making their selections, they cannot complain of the statute on constitutional grounds."³¹

The prohibition in the Act against interference with the employees' right to freedom of organization was amplified and made more explicit by the 1934 amendment. The 1934 amendment also imposed various other obligations upon the carrier to which criminal penalties were attached. In *Virginian Railway Co. v. System Federation*,³² the constitutionality of the Act as amended in 1934 was questioned, insofar as the Act imposed a legal obligation upon carriers enforceable by equity decree, to deal with employees' bargaining representatives. The Act was sustained and precedent thereby afforded for a like provision (but enforceable in a different manner)³³ in the National Labor Relations Act. The 1934 amendment also created the National Railroad Adjustment Board, and gave to the Board jurisdiction over disputes arising in connection with the interpretation or application of collective bargaining agreements. The Railway Labor Act was further amended in 1936 to include within its purview common carriers by air engaged in interstate or foreign commerce, and air carriers transporting mail for the United States Government. The 1936 amendments also set up a National Air Transport Adjustment Board.

31. *Texas & N. O. R. Co. v. Brotherhood Ry. & S. S. Clerks*, 281 US 548, 50 S Ct 427, 74 L Ed 1034 (1930).

32. 300 US 515, 57 S Ct 592, 81 L Ed 789 (1930).

33. See, for a discussion of the National Labor Relations Act, *infra*, chapter sixteen, especially, in connection with the point made in the text, sections 243, 281-292. The Railway Labor Act also introduced into federal legislation, as notions which were transplanted into the National

Labor Relations Act, (1) the principle of majority rule; (2) the idea of an appropriate bargaining unit, and certification of the representative thereof to employers for the purpose of collective bargaining; (3) the obligating of an employer to bargain collectively with such bargaining representative; (4) the conception of a right to organization on the part of employees free from interference, restraint or coercion on the part of employers.

Section 240. The Company Union—More Recent Development and General Reflections.

Though virtually destroyed as an institution in railroad industrial relations, the company union continued to be employed in other industries. The depression period from 1930 to the advent of the NIRA on June 6, 1933, dealt a severe blow, however, to membership in trade unions and the necessity for the initiation of company union plans. It has been calculated that pay rolls dropped 60% during the period from 1922 to 1932.³⁴ Workers' allegiance was welded to employers by the scarcity of available jobs. Industrial relations became a secondary American problem in the face of such a general economic crisis. With the passage of the NIRA and the hopes which that Act engendered almost everywhere, trade unions and company unions commenced anew to flourish.³⁵ It was contended that of the company unions found in 1935, approximately two-thirds were established during the NIRA.³⁶

Such are the circumstances which gave rise to the company union. Employers have contended that industrial relations can be as fair to the worker and certainly more peaceful and cooperative with management through utilization of company unions as by intercession of large, affiliated labor unions. This organized labor denies.³⁷ It is pointed out that the company union has come into existence generally during strife involving labor unions and for the bad faith purpose of diverting workers' loyalty from organizations formed primarily for their benefit.³⁸

34. United States Department of Labor Bureau of Labor Statistics, Bulletin No. 610; Revised Index of Factory Employment and Pay Rolls, 1919 to 1933. (Washington, 1935), p. 22.

35. In 1933, the A.F.L. paid-up membership was 2,126,796. In 1935, it was 3,045,347—an increase of forty-three per cent. A.F.L. Report of Proceedings of the Fifty-Fifth Annual Convention (1935), p. 29.

36. *Ibid.*, pp. 60-61.

37. An extended investigation into the characteristics of company unions was launched by the United States Department of Labor, and the results thereof published in June, 1937 (Bulletin No. 634).

38. "Examination of a representative group of 126 company unions indicates that their establishment was most frequently due to the pressure of trade-union activity, either in the form of organization drives or strikes in the trade or vicinity.

The company union, moreover, is said to be a contradiction in terms, being merely an extension in union cloak of the process of individual as distinguished from collective bargaining. Even were the company union a bona fide employees' organization, say labor leaders, it would have no place as an instrumentality for the assertion of workmen's rights because it necessarily lacks funds to engage in strikes, national association for cooperative purposes, or experience in the bargaining process which necessarily comes from contact with the larger labor movement.³⁹ Finally it is said to be predicated upon the erroneous notion that the individual employer is the bargaining unit. Chaos, not order, is contended to be the consequence of such a notion because the establishment of uniform conditions of employment in the entire given industry is one of the oldest aims of the labor movement.⁴⁰ The effect of the National Labor Relations Act upon company unions is considered hereafter, at sections 293-304.

Legislation and other governmental action was also an important factor. Few company unions were set up in the absence of such external influences." United States Department of Labor, Bulletin No. 634 (1937), p. 199.

39. "Most of the company unions studied relied entirely upon management for their finances. Many others received more or less important financial assistance from the employer. Financial dependence upon management generally meant that proposed expenditures by the company union had to be approved by management. Less than 10 per cent of all the company unions appeared to be financially self-supporting." United States Department of Labor, Bulletin No. 634 (1937), p. 200.

40. "The company unions were hampered by their inability to control wage conditions in more than one plant." United States Department of Labor, Bulletin No. 634 (1937), p. 205.

ment of Labor, Bulletin No. 634 (1937), p. 203. "The degree of isolation in practice was even greater than that inherent in the structure limited to the employers of a single company. Thus, few interested themselves in any proposed legislation or governmental action affecting workers. They did not hire persons outside the plant to assist negotiations with their employers. Neither did they seek arbitration by impartial outsiders of requests refused by the employer. So rarely was strike action ever considered that the threat of withholding their labor played virtually no part in negotiations with their employers. . . . the most vigorous of these organizations had no means for marshalling the moral and financial support of large bodies of workers to influence the terms of the labor contract beyond the confines of a single company." United States Department of Labor, Bulletin No. 634 (1937), p. 205.